No. 92-938

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MAURICE RIVERS AND ROBERT C. DAVISON,
Petitioners,

v.

ROADWAY EXPRESS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. THE 1991 CIVIL RIGHTS ACT ITSELF MAKES CLEAR THAT § 101 APPLIES HERE

A. The Statute's Text and Structure Support Application of § 101

The central statutory construction question relating to the applicability of the Civil Rights Act of 1991 is what meaning to give to § 402(a). Respondents urge the Court to abandon any effort to divine meaning from the language of the statute. They argue that each of the key statutory provisions which bear on the statute's applicability — § 402(a), § 402(b) and § 109(c) — is devoid of meaning. Evaluated under normal principles of construction, however, these provisions are certainly as clear as the provisions this court has readily construed in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990), and other cases.

Roadway's only argument that the Act makes § 101 inapplicable is that the phrase "take effect upon enactment" was routinely interpreted to apply only to conduct and trials occurring after enactment. Roadway Br. at 15. The six court of appeals decisions upon which Roadway relies in support of this assertion simply do not hold that such language means that a statute is not to be applied to pending cases. On the contrary, four of Roadway's cited cases expressly assert that such language did *not* resolve the question of applicability of the statutes at issue. The other two of Roadway's cases rely on *different* statutory language not present in the 1991 Act in addition to the general effective date provision. See Appendix B. Based on these cases, a Congress presumed to know the existing law would have no basis whatsoever to assume that "take effect upon enactment" means that the statute shall not apply to pre-Act conduct.

In *Weaver v. Graham*, 450 U.S. 24 (1981), another case upon which Roadway relies, this Court held that language requiring application of new statutory provisions "on the

effective date of the act" must be read to mean that new provisions *did* apply to pre-Act conduct. In *Weaver*, this Court considered whether a Florida statute diminishing gain time earned by convicted prisoners by its express terms applied to gain time earned pre-enactment. The Court determined that the statute on its face "[c]learly" would apply "to prisoners convicted for acts committed before the provision's effective date." *Id.* at 31.[1] Thus, under *Weaver* the Court could, based on the language of § 402(a) alone, construe § 101 to apply to pending cases addressing pre-Act discrimination.

In addition to § 402(a), the sections excepting certain pre-Act cases and conduct from the general rule — §§ 402(b) and 109(c) — support petitioner's position that the Act expressly applies. These exceptions must be read under established canons to (i) have a meaning *different* from (rather than redundant of) § 402(a) and[2] (ii) describe the *only* situations receiving the specific treatment they demand.[3]

The existence of specific exceptions suffices to make clear the underlying rule even under the exacting standard

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[1] Once it determined that the statute would apply, the Court then proceeded to determine that the gain-time amendment violated the *ex post facto* clause, but in doing so the Court expressly distinguished its analysis under the *ex post facto* clause from "the test for evaluating retrospective laws in the civil context." *Id.* at 29, n. 13.

[2] See Appendix C (listing Supreme Court cases relying on the anti-redundancy canon).

[3] See Appendix D (listing Supreme Court cases relying on the canon that the inclusion of one thing implies the exclusion of others ("expressio unius est exclusio alterius"), including two during 1993).

applied in Eleventh Amendment cases.[4] In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court was faced with precisely the same kind of indicia of intent that petitioners point to here, and it held that those indicia sufficed to show that CERCLA subjected the states to suit in federal court. Under CERCLA, the general definition of "owners and operators" was held to be ambiguous standing alone, *id.* at 8, n. 2, but an exception that excluded states from liability under certain circumstances made clear that states were otherwise subject to suit. That exception acted as "an express acknowledgement of Congress' background understanding ... that States would be liable in any circumstance ... from which they were not expressly excluded." *Id.* at 8.

The substance of the Civil Rights Act supports petitioners' interpretation of § 402(a). Under Roadway's view, §§ 402(b) and 109(c) are redundant, and Roadway implies that but for errors in final drafting these provisions would have been eliminated. Roadway Br. at 23. On the face of the statute, however, it makes sense that Congress chose to bar application of the Act to pending cases only with regard to §§ 109(c) and 402(b). While most of the 1991 Act is procedural and remedial, § 109(c), in contrast, clearly made illegal under Title VII conduct which had previously been wholly legal. Section 402(b), which only makes the Act inapplicable to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), was arguably a targeted effort to put to rest a

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[4] The proper standard of clarity according to which the 1991 Act should be read is not a clear-statement rule, but the standard this Court employed in *Bonjorno*. Under *Bonjorno*, whether the statute's "plain language" requires that it be applied to pending cases is determined by "the most logical reading of the statute," 494 U.S. at 839, 838, which may be "[i]mplicit," *id.*, 839, and need not be "clear and unequivocal," as Roadway asserts.

case in which, after sixteen years of litigation, plaintiffs had not established any liability.[5]

Roadway and USI Film Products are, in effect, arguing that they, too, should have been included in the statute's two express exceptions and obtained the same treatment as defendants in cases by United States nationals abroad under § 109(c) and the *Wards Cove* case under § 402(a). Roadway contends that the change made by § 101 is like the change made by § 109, even though for Roadway, unlike for ARAMCO, the discrimination alleged was illegal all along under Title VII, and § 101 has no subsection like § 109(c) limiting its applicability. USI Film Products contends that providing for new remedies is unfair in a case filed in 1989, but the change made by § 402(b) expressly drew a different line, finding unfairness only in applying the Act to old cases in which "a complaint was filed before March 1, 1975." It is thus respondents themselves, not petitioners, who are "waging in a judicial forum a specific policy battle which they ultimately lost." USI Film Products Br. at 16-17, *quoting Chevron US, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 864 (1984).

Respondents seek to undercut the "most logical reading" of the statute by reference to legislative history. But where the language is reasonably clear, legislative history must not be relied upon to create ambiguity. *United States v. McMann*, 434 US 192, 199 (1977). After the language of the Act was agreed upon, statements were made on the floor of the Senate expressing conflicting views on its meaning. Prior to enactment, however, the vast majority of voting members expressed no position at all about the meaning of the effective date provisions, and all that is known about most

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[5] The constitutionality of § 402(b) has been challenged in the *Wards Cove* case.

members' views is that they approved the statute's text. This is why the text should be given controlling effect.

B. The Identity Between § 1981 Prior to *Patterson v. McLean Credit Union* and As Amended By § 101, and the Virtually Unanimous Acknowledgment in Congress of that Identity, Confirm that § 101 is Restorative

Respondents concede that, if Congress intended § 101 to be restorative, such intent would be evidence in favor of application of the section to existing cases: "To be sure, the 'restorative' purpose of a law ... may provide a suggestion of Congress' intent to act retroactively." Roadway Br. at 43. That § 101 both was restorative and was intended to be is made evident by a simple comparison of the state of law prior to *Patterson v. McLean Credit Union* and after the Civil Rights Act of 1991. It was well established prior to this Court's *Patterson* decision that § 1981 generally covered discrimination in all aspects of employment. In addition to this Court's repeated assumption that § 1981 covered discharge, and the Sixth Circuit's numerous holdings to that effect,[6] the nearly 200 cases listed in Appendix E show that prior to *Patterson* § 1981 was overwhelmingly construed to cover discrimination in every aspect of employment now included in § 101.[7]

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[6] *See* Petitioners' Br. at 28, nn. 29, 28.

[7] Defendants' assertion that "the law under Section 1981 was in a state of flux," Roadway Br. at 30, is completely refuted by the hundreds of cases holding § 1981 applicable to all aspects of employment. Virtually every federal judge in the United States who dealt with the issue prior to *Patterson* held that § 1981 prohibited discriminatory discharge. In every area of the law, no matter how settled, there is always some disagreement. But the two lone district court cases upon which Roadway relies do not change the reality that § 1981 was interpreted prior to *Patterson* to have

(continued...)

The overwhelming majority of the members of Congress who spoke about the provision that was finally enacted as § 101 characterized it as restorative. Appendix F (listing references to § 1981 as rejecting *Patterson* to restore prior law).[8]

II. THIS COURT SHOULD REAFFIRM *BRADLEY V. RICHMOND SCHOOL BOARD*, AND APPLY § 101 HERE

If the statutory language is held to be unclear, the question is what default rule of statutory applicability governs: the established rule of *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), and *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969), that new statutes generally do apply, or a new rule purposed by respondents under which they might not. Roadway urges the Court to overrule *Bradley* and

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[7](...continued)
the same coverage as it does amended by § 101. The court in *Minority Police Officers v. City of South Bend*, 617 F. Supp. 1330, 1352, n. 52 (N.D.Ind. 1985), was uncertain whether even the Fourteenth Amendment prohibited intentional race discrimination in public employment. The court in *Williams v. Atchison, Topeka and Santa Fe Ry.*, 627 F. Supp. 752, 757, n. 5 (W.D.Mo. 1986), actually acknowledged the prevailing assumption that Title VII and § 1981 "run parallel, except for the more liberal damage potential of § 1981," and cited circuit court precedent to that effect.

[8] The fact that the statute as it was enacted says that it "expands" and provides "additional" protections is not inconsistent with its restorativeness, nor is President Bush's reference to "expanded protections." Viewed relative to the law immediately prior to passage of the Act in 1991, the law did "expand" and "add" to § 1981 beyond the contours *Patterson* accorded it. Viewed relative to the law as it stood prior to *Patterson*, however, the 1991 Act restored § 1981. This wording does not in any way affect the universality of congressional opinion that § 101 was, and was meant to be, restorative, and the necessary conclusion that § 101 should be applied here.

Thorpe. Respondents rely primarily on the concurring opinion of Justice Scalia in *Bonjorno*. Under Justice Scalia's rule, new laws should be presumed to apply to pending cases only where such application is deemed to be "prospective," but not where it would have a "retroactive" effect. 494 U.S. at 841. Because the rule urged by Justice Scalia is contrary to established law and is entirely unclear in scope, this Court should reaffirm *Bradley*.

A. The Default Rule Respondents Advocate Would Require the Courts to Make Difficult and Unguided Distinctions Between New Statutes that Apply to Pending Cases and New Statutes that Do Not

Notwithstanding important disagreements about the proper default rule, the parties agree about at least two points: First, all agree that laws which render illegal conduct which was legal when it was engaged in, or which eliminate vested rights (such as property interests or accrued causes of action), presumptively apply only to conduct occurring after the new rule is adopted. Under Justice Scalia's rule, application of new laws under these circumstances would be among the types of conduct labelled "retroactive." Under *Bradley*, such application would be manifestly unjust.

The second point of agreement is that there is *some* category of new laws which presumptively do apply to pre-enactment claims. Justice Scalia proposes to define the word "retroactive" in such a way that application of some new laws to pending cases would not be labelled "retroactive."[9] Such

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[9] Roadway asserts that Rivers and Davison committed semantic suicide by conceding that application of § 101 should be labelled "retroactive," Roadway Br., at 13, but this assertion is simply false. Petitioners in their brief, including at the pages cited by Respondent,
(continued...)

non-retroactive applications arguably include the attorneys' fees statute at issue in *Bradley*,[10] as well as at least some procedural and other rules.[11] Under *Bradley*, the category of cases in which applications of new laws is presumptively correct includes all laws the application of which would not produce a manifest injustice, which has consistently been understood to refer to changes in procedural and remedial laws. *See* Appendix G. In essence, what the parties agree about is simply that there are two categories of new laws — those which presumptively apply to pending cases, and those which presumptively do not. The dispute here concerns where to draw the line between those two categories.

Respondents and Justice Scalia attack *Bradley*'s manifest injustice exception as a mechanism by which "[a] rule of law, designed to give statutes the effect Congress intended, has . . . been transformed to a rule of discretion, giving judges power to expand or contract the effect of legislative action." *Bonjorno*, 494 U.S. at 857, *cited in* Roadway's Br. at 49. This contention is baseless, for at least two reasons:

First, the lower federal courts have implemented this standard for over a century. The experience of the lower

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[9](...continued)
consistently pose the question as whether § 101 applies to their pending claims, not as whether § 101 should be given "retroactive" effect. *E.g.* Petitioners' Br. at 9, 14.

[10] *See Bonjorno*, 494 U.S. at 849 (Scalia, J., concurring).

[11] *See, e.g.* Brief for the American Trucking Associations, *et al.*, as Amici Curiae Supporting Respondents, at 18 (stating that "it may be that most procedural changes are unlikely to have any retroactive effect (*i.e.* to change the consequences of prior conduct) and may routinely be applied to pending cases.... Application of such changes to pending cases have [sic] only prospective effects").

courts has established a clear and workable distinction between procedural and remedial changes in the law on one hand and changes affecting vested rights or substantive standards of conduct. *See* Appendix H; Appendix G. The principal source of confusion is Justice Scalia's own assertion in his concurrence in *Bonjorno* that *Bradley* was an aberration. *See e.g.*, Appendix to Petition for Certiorari in *Landgraf v. USI Film Products, Inc.*, No. 92-757 (listing cases applying and not applying the 1991 Civil Rights Act to pending cases).

Second, this Court itself commonly uses a virtually identical "justice" standard in its orders instructing lower courts when to apply new rules to pending cases, presumably finding it to be a clear standard for application of new rules to pending cases. *See* Appendix I (listing orders applying new rules to pending cases "insofar as just and practicable", or unless doing so "would not be feasible or would work injustice"). Justice Scalia himself has approved at least four such orders, including one on April 17, 1990 — just two weeks before the *Bonjorno* decision.

In place of the rule reaffirmed in *Bradley*, which has been administered by the lower courts for over a century without difficulty, Justice Scalia proposes an entirely new rule. Justice Scalia's rule will turn on an as-yet-to-be articulated definition of the term "retroactive." Justice Scalia himself concedes that adoption of his rule would "not ... always make it simple to determine the application in time of new legislation." *Id.* at 857. Among the admitted problems with his proposed approach is that "[i]t will remain difficult, in many cases ... to decide whether a particular application is retroactive." *Id.* Respondents and their *amici* repeatedly assert that Justice Scalia's rule is a clear, "bright-line" rule. On the contrary, it is an unexplained rule with unforeseeable consequences.

Respondents and Justice Scalia urge that the rule against "retroactivity" in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), applies to changes in procedural and remedial laws. *Bowen* held that "retroactive" rules could not be promulgated without express statutory authority, but this holding cannot include procedural and remedial rules. Despite *Bowen*, and the absence of express authorization for retroactive rulemaking in the Rules Enabling Act,[12] this Court has itself consistently ordered that amendments to the Federal Rules be applied in pending cases. *See* Appendix I (listing United States Supreme Court Orders applying new rules to pending cases). These orders would be entirely inconsistent with *Bowen* unless *Bowen*'s dictate against "retroactivity" did not extend to procedural changes in governing law, but rather comported with *Bradley* in presuming that such changes are applicable in pending cases.

Even under Justice Scalia's rule against retroactive application of new laws, § 101 should be applied here because the changes that § 101 would cause in this case are not "retroactive." Rivers and Davison seek application of § 101's procedures and remedies in a trial which has not yet occurred. As explained in our opening brief, what is at stake here is whether the right to a jury trial and damages under § 1981 as amended by § 101 will apply in a retrial of plaintiffs' discharge claims on a remand for a trial on these claims that will occur in any event. Pet. Br., at 9. Whether a jury will hear the discharge claims is a question that relates to procedures for conducting a trial in the future. Similarly, if the jury finds liability on the discharge claim, whether that

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[12] 28 U.S.C. § 2027(a) grants the Court "power to proscribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals." It includes no express grant of power to apply new rules retroactively.

jury will calculate only the extent of lost wages, or whether it will also compensate for other harm the discrimination caused the plaintiffs, is a question relating to the standard for a decision that the jury has yet to make. Thus, under either rule, § 101 should apply.

B. *Bradley* Was Consistent With Prior Law

In his concurrence in *Bonjorno*, Justice Scalia argued that *Bradley* was inconsistent with prior decisions. As we set forth below and in related Appendices, *Bradley* was in fact fully consistent with the law prior to 1974. In reading decisions prior to *Bradley*, it is important to bear in mind that the way in which the courts used the term "retroactive" changed over time. In the nineteenth century, the courts generally used the term "retroactive" to refer only to those laws which they believed should not apply to pre-enactment claims. The courts labelled "retroactive" laws which, if applied, would have eliminated accrued causes of action or impaired vested rights. Application of new remedial and procedural laws was termed "prospective," or "non-retroactive." "Retroactive" was then, much like "ex post facto" is today, a conclusory label applied to those categories of statutes which the courts believed did not properly apply to pending cases.

The traditional prohibition against "retroactive" laws is consistent with *Bradley* as elaborated in *Bennett*. See Petitioners' Br. at 39-45. It was when the courts began to use the term "retroactive" to refer more generally to *any* application of new law to pending cases that the default rule was properly articulated as *favoring* retroactive application of new laws in certain circumstances. *See, e.g., Larkin v. Saffarans*, 15 F. 147, 150 (C.C. W.D. Tenn. 1883) (remedial laws); *Bowles v. Strickland*, 151 F.2d 419, 420 (5th Cir. 1945) (procedural laws). In sum, a rule recognizing the distinction between applicability of new substantive laws and new

procedural or remedial changes has been made consistently for more than a century, and all that has changed is the language used to describe that rule.

1. Supreme Court Cases

We set forth in our opening brief Supreme Court cases preceding *Bradley* which held that changes in procedural and remedial rules presumptively apply to pending cases. Pet. Br. at 31-36. We set forth below other authorities.

2. Court of Appeals Decisions

For almost a century prior to *Bradley*, and for the two decades since, the lower federal courts consistently recognized and regularly implemented a distinction between changes in substantive obligations and changes in remedies or procedures. One of the earliest decisions observed that the presumption in favor of application of procedural and remedial rules to existing claims was "in accordance with the general rule that all remedial legislation shall be liberally construed, and particularly should this be so where new remedies are given." *Larkin v. Saffarans*, 15 F. 147, 150 (C.C. W.D. Tenn. 1883). That presumption in favor of applying changes in procedure was understood to refer broadly to "the procedural machinery provided to enforce" existing rights. *Bowles v. Strickland*, 151 F.2d 419, 420 (5th Cir. 1945). The distinction between the two presumptions was, as one court put it, "settled rule" long before *Bradley*. *Dargel v. Henderson*, 200 F.2d 564, 566 (Em. Ct. App. 1952). Among the pre-*Bradley* circuit court opinions on this issue, there does not appear to be a single dissent. Under this long-established distinction, statutes providing for more complete relief for conduct that was already actionable were construed to apply to pending claims. *See* Appendix H.

3. Treatises

Justice Scalia in *Bonjorno* quotes Chancellor Kent's

statement that "it cannot be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed." *Bonjorno*, 494 U.S. 855 (Scalia, J., concurring), *quoting* J. Kent, *Commentaries on American Law* *455. But Chancellor Kent goes on to explain that his objection is to a law "affecting and changing vested rights," and emphasizes that the doctrine quoted by Scalia

> is not understood to apply to *remedial* statutes, which may be of a retrospective nature, provided they do not impair contracts, or disturb absolute vested rights, and only go to confirm rights already existing, and in furtherance of the remedy ... adding to the means of enforcing existing obligations.

Commentaries on American Law at *455-*456 (Emphasis added). Justice Scalia also quotes Justice Story's statement that

> retrospective laws are ... generally unjust; and ... neither accord with sound legislation nor with the fundamental principles of the social compact.

108 L. Ed. 2d at 856, quoting J. Story, *Commentaries on the Constitution*, § 1398 (1851). Respondents rely on the same quotation. Roadway Br. at 9. But Justice Story himself *defined* "retrospective law" not to refer to any new statute affecting pending cases, but as a

> statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a disability, in respect to transactions or considerations past.

Society v. Wheeler, 2 Gall. 139 (1814). Over a century ago the Supreme Court read Justice Story's definition to mean that a

statute providing a new *remedy* to enforce an existing right was not, even as applied to a pre-Act violation, a "retroactive law." *Sturges v. Carter*, 114 U.S. 511, 519 (1885). By the end of the nineteenth century, treatises uniformly made this distinction. *See* Appendix I. The article by Instructor Smead on which Justice Scalia and Respondents relied is expressly about statutes which, if applied in pending cases, would eliminate vested rights.[13]

4. State Constitutions and Laws

Justice Scalia noted in *Bonjorno* that a number of state constitutions contain express prohibitions against "retroactive" laws. 494 U.S. at 856. These state provisions have long been construed, however, in a manner consistent with pre-*Bradley* federal decisional law, *not* to forbid new legislation at provided different remedies or procedural mechanisms to enforce pre-existing obligations. *See* Appendix K. Cases from other states also support the distinction upon which petitioners rely. *See* Appendix L. Judge Kent's opinion in *Dash v. Van Kleck* is expressly limited to statutes which alter vested rights. 5 Am. Dec. 291, 308, 309, 310, 312 (1811) (opinion of Kent, J.); *see also*, *id*. at 302, 303, 306 (opinion of Thompson, J.).

5. English Cases

Respondents contend that their rule "has an ancient lineage," Roadway Br. at 9, but it is clear that the distinction between statutes altering standards of conduct or vested rights and statutes affecting procedures and remedies for enforcing those standards and rights was established in Great Britain by the mid-nineteenth century. The leading case was *Wright v. Hale*, 6 Hurl. & Norm. 226 (Ct. Exchequer 1860),

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[13] Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 781, n. 22 (1936).

which applied to pending cases a newly enacted statute limiting awards of costs. Baron Pollock explained that "[t]here is a considerable difference between new enactments which affect vested rights and those which merely affect the procedure in courts of justice, such as those relating to the service of proceedings, or what evidence must be produced to prove particular facts.... Rules as to the costs to be awarded in an action are of that description, and are not matters in which there can be vested rights."[14] English common law does not support the rule respondents advocate, which would reject application of any new rule that alters a party's expense associated with past conduct.

6. Prior Views of Respondent's Counsel

Counsel for Respondent Roadway argues with great force that *Bradley* is bad law, and has been repudiated by the Supreme Court in cases such as *Bowen* and *Bennett*. The same counsel told the Senate in May 1990, however, precisely the opposite. He described *Bradley* as governing law under

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[14] 6 Hurl. & Norm. at 230-31; see also *id*. at 231-32 (Channel, B.) ("In dealing with acts of parliament which would have the effect of taking away rights of action, we ought not to construe them as having a retrospective operation, unless it appears clearly that such was the intention of the legislature; but the case is different where the Act merely regulates practice and procedure"); *Kimbray v. Draper*, 3 Q.B. (L.R.) 160, 163 (Q.B. 1868) (Blackburn, J.) ("When the effect of an enactment is to take away a right, prima facie it does not apply to existing rights; but where it deals with procedure only, prima facie it applies to all actions pending as well as future"); *Towler v. Chatterton*, 6 Bing. 258 (Ct. Com. Pleas. 1829) (applying to pending case new statute regarding evidence needed to place case outside limitations period); *Cox v. Thomason*, 2 C. & J. 498 (Ct. Exch. 1832) (applying to pending case new rule of court regarding taxation of costs). In *Freeman v. Moyers*, 1 A. & E. 338 (K. B. 1834), (holding applicable to pending cases a new statute rendering certain unsuccessful plaintiffs liable for costs).

which, as petitioners here contend, new laws that affect procedures and remedies are presumptively applicable to pending litigation. *See* Appendix M.

C. Section 101's Remedial and Procedural Nature is Unaffected By Whether § 1981 is "A Distinct Positive Law" From Title VII

Roadway does not contend that discriminatory discharge was legal at the time it fired Rivers and Davison. Because race discrimination in any aspect of employment, including discharge, was prohibited under Title VII when Roadway discharged Rivers and Davison, applying § 101 here to authorize a jury trial and damages for the discharge claim simply applies additional remedies and procedures for conduct which has at all times been illegal. Whether § 1981, as amended by § 101, is a "separate" or "distinct positive" law from Title VII does not affect the fact that application of § 101 here is remedial. *Cf. Pennsylvania v. Union Gas Co.*, 491 U.S. at 8, n. 2 (reading separately enacted legislation "*in combination*") (emphasis in original). The location of the codification of § 1981 and Title VII in the statute books is not determinative of whether application of the § 101 jury trial and damages provisions in this case is remedial.[15]

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[15] Even if where § 101 is codified *were* determinative, § 101 is properly viewed as remedial of discrimination prohibited by Title VII. Title VII and § 1981 are both codified in Chapter 21 of Title 42 of the United States Code. Section 101 is codified as § 1981(b). The 1991 Act expressly recognizes the interrelationship between § 1981 and Title VII by codifying the new Title VII damages provisions at § 1981A. Roadway's position is thus reduced to a contention that plaintiffs could prevail only if Congress had *also* moved § 2000e-5(a) of Title VII to make it part of § 1981. Only the most arbitrary and unworkable doctrine would make such a detail of statutory compilation determinative of whether § 101 applies to pending discrimination claims.

The federal courts have overwhelmingly rejected Roadway's reasoning that, where the substantive conduct at issue was prohibited when engaged in, a new remedy does not apply if the preexisting prohibition was established by a different law from that in which the remedy was announced. *See* Appendix N. The very cases upon which Roadway relies support the conclusion that § 101 provides additional remedies for employment discrimination which Title VII also prohibits. *See* Roadway Br. at 27-29. For example, this Court in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), characterized § 1981 as "a remedy," *id.* at 466, and referred to Title VII as conferring "remedies" that are co-extensive with § 1981, *id.* at 459, and to Title VII and § 1981 as "two procedures" for enforcing the same rights. *Id.*[16] *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), similarly emphasized that legislative enactments in the nondiscrimination area, specifically including Title VII and § 1981, "have long evinced a general intent to accord parallel or overlapping *remedies* against discrimination." *Id.* at 47.

Roadway mischaracterizes the issue presented by this case when it asks whether § 101 should be applied to "conduct which was adjudicated to be non-discriminatory prior to the date on which Section 101 became law," Roadway Br. at i, or to "trials occurring before the date of its enactment." Id. at iii, iv, 8, 13, 26; *see id.* at 14. The question is not whether § 101's new remedies could *require* a new trial of claims that were properly tried under pre-Act law, but

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[16] *See e.g. Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (referring repeatedly to the different "remedies" and the "procedures" § 1981 and Title VII provide for the same conduct); *United States v. Burke*, 112 S.Ct. 1867, 1873 (1992) (explaining that "the circumscribed *remedies* available under Title VII stand in marked contrast ... to those available ... under other federal antidiscrimination statutes....") (emphasis supplied).

whether § 101 should be applied to a new trial which will occur in any event, without regard to whether § 101 applies.[17]

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[17] Although it declined to apply § 101, the Sixth Circuit remanded the § 1981 retaliatory discharge claim for trial on the ground that the district court's dismissal of that claim turned on a misapplication of *Patterson*. On remand, the jury — to which plaintiffs are already entitled on the retaliation claim under *Patterson*, even apart from § 101 — may find that Roadway did discriminate against the plaintiffs in their efforts to enforce their contract rights. If the jury so finds, then the district court's factual finding of non-discrimination under Title VII cannot collaterally estop the jury's verdict, but will have to be vacated and a new Title VII judgment entered consistent with the jury's verdict. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), *cited in Harvis v. Roadway Express*, 973 F.2d 490, 495 (6th Cir. 1992), P.A. 9a-10a. Respondents did not raise for consideration by this Court any issue of collateral estoppel. *Cf. Leatherman v. Tarrant County*, 113 S. Ct. 1160, 1162 at n. 1 (1993).

Roadway suggests that the district court's Title VII determination on the claim of discriminatory discharge would not be reopened because "the court of appeals did not purport to remand on those claims; it remanded only on the retaliation claims." Roadway Br., at 4 n. 1. As the Court of Appeals recognized in its opinion, however, if the jury's determination on the common issues of fact relating to racial motive differs from the judge's, the Seventh Amendment requires that the jury's determination prevail. The district court will then have to vacate the inconsistent Title VII determination. If the 1991 Act applies here, the jury will determine the discharge claim as well as the retaliation claim, and determine the propriety of damages on each; if not, the court will enter a judgment on discharge. It is thus not a "free-standing jury trial right," Roadway Br. at 35, which Rivers and Davison assert, but a right to have a jury on claims when those claims are to be adjudicated in any event.

The appellate court's failure to vacate the Title VII judgment does not affect plaintiffs' rights under *Lytle*. It could well have been considered premature for the court of appeals, rather than the district court on remand, to vacate the Title VII judgment. If the jury decides that no discrimination occurred, the Title VII judgment need not be disturbed.

III. THIS COURT SHOULD NOT RETROACTIVELY CHANGE RULES ABOUT STATUTORY APPLICABILITY UPON WHICH CONGRESS HAS RELIED

There is probably no area of the law where *stare decisis* is of such practical importance, and so vital to preserving the proper balance between Congress and the courts, as the rules of statutory construction. The rules of construction are a critical part of the context in which Congress legislates; they control the terms, syntax and structure which Congress must use to achieve a desired result. Changing a rule of construction would be as disruptive of the law-making process as a decision to change by judicial fiat the meaning of a word commonly used in federal statutes. The truism that Congress is presumed to legislate with a knowledge of the law is particularly important, and realistic, with regard to the principles of statutory construction.

Over the course of the last two decades, congressional reports and individual members of Congress have repeatedly referred to *Bradley* as establishing the rule of interpretation regarding pre-Act claims. *See* Appendix O. Since 1974, Congress has enacted more than 5000 Public Laws encompassing 40,000 pages of Statutes at Large. Stat. at Large, vols. 89-106. In the vast majority of these statutes, Congress chose not to attempt to specify expressly which provisions would and would not apply to pre-existing cases, but decided instead to let that issue be determined through judicial application of established legal principles. To now alter the rules of interpretation applicable to those statutes would wreak havoc with the intent and expectations of Congress.

Bradley has proved to be a highly accurate method of ascertaining congressional intent. Despite the frequency with which this issue has arisen in the courts, it appears that

Congress has never overturned by legislation any of the circuit court decisions before or after *Bradley* regarding the applicability of particular statutes to pre-Act claims. Justice Scalia's concurrence in *Bonjorno* now proposes, paradoxically, that the Court announce — and apply retroactively — a new rule against the retroactive application of new rules.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it did not apply the Civil Rights Act of 1991 petitioners' pending claims.

Respectfully submitted,

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APPENDICES

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K Colorado, Montana, New Hampshire, and Ohio Cases Interpreting the Respective State Constitutional Provision Prohibiting "Retroactive" Statutes

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APPENDIX B

Appellate Decisions Upon Which Respondents Rely Construing "Take Effect Upon Enactment"

Court held phrase did not resolve applicability:

1. *Leland v. Federal Ins. Adm'r*, 934 F.2d 524, 529 (4th Cir.) *cert, denied*, 112 S. Ct. 417 (1991) (giving credence to *Bradley* and analyzing question without regard to statutory language about application upon enactment, but rather concluding that *no* congressional intent "is discernible from []either the language of the amendment itself []or from any other indication of congressional intent")

2. *Jensen v. Gulf Oil Refining & Marketing Co.*, 623 F.2d 406, 409 (5th Cir. 1980) (relying on *Bradley* and holding "we do *not* find the statement that the amendment prohibiting involuntary retirement before age sixty-five shall take effect upon enactment dispositive") (emphasis added).

3. *Sikora v. American Can Co.*, 622 F.2d 1116, 1120 (3rd Cir. 1980) (citing *Bradley* in its exposition of the law and stating "we turn to the statute under consideration and find its *language equivocal*. Congress simply provided that the amendment prohibiting involuntary retirement before age 65 'shall take effect on the date of enactment of this Act...'") (emphasis added).

4. *Yakim v. Califano*, 587 F.2d 149, 150-51 (3rd Cir. 1978) (relying on *Bradley* in holding that language in § 20 directing that statute take effect on the date of enactment gives "*no* explicit direction on the retroactivity issue," and proceeding to determine that

it was a different statutory subsection, § 15(c) which "indicat[ed] that Congress was aware of the retroactivity problem and decided to limit such effect to those cases eligible for a fresh review under the Reform Act")(emphasis added).

Court also relied on different statutory language:

5. *Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1140 (4th Cir. 1980) (citing *Bradley*, but deciding based on text that the Pregnancy Discrimination Act, which in addition to stating that it shall take effect upon enactment states that it "shall not apply to any fringe benefit program or fund, or insurance program which is in effect on the date of enactment of this Act until 180 days after enactment of this Act," is inapplicable where it would impose liability for actions under a fringe benefit program which occurred 7 years prior to the Act).

6. *Schwabenbauer v. Board of Education*, 667 F.2d 305, 310 n. 7 (2d. Cir. 1981) (relying on *Condit* and the same additional statutory language considered there in order not to apply the Pregnancy Discrimination Act where it would have "invalidated past conduct").

APPENDIX C

United States Supreme Court Decisions
Applying the Canon of Construction that
No Word in a Statute Should be Read to be Redundant

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1. *Sale v. Haitian Centers Council Inc.*, 113 S. Ct. 2549 (1993)

2. *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992)

3. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-60 n.8 (1988)

4. *Mackey v. Lanier Collection Agency and Serv., Inc.*, 486 U.S. 825, 837 (1988)

5. *Kungys v. United States*, 485 U.S. 759, 778 (1988)

6. *Mountain States Tel. and Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)

7. *Securities Industry Ass'n v. Bd. of Governors of Federal Reserve System*, 468 U.S. 207, 165 (1984)

8. *Jewett v. Commissioner of Internal Revenue*, 455 U.S. 305, 315 (1982)

9. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)

10. *Colgrove v. Battin*, 413 U.S. 149, 184 (1973)

11. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)

12. *Shapiro v. United States*, 335 U.S. 1 (1948)

13. *Singer v. U.S.*, 323 U.S. 338, 344 (1945)

14. *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)

15. *Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879)

APPENDIX D

United States Supreme Court Decisions Recognizing the Canon of Construction "Expressio Unius Est Exclusio Alterius"

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1. *Crosby v. United States*, 506 U.S. ___, 122 L Ed. 2d 25, 30 (1993)

2. *Leatherman v Tarrant County*, 507 U.S. ___, 122 L. Ed. 2d 517, 524 (1993)

3. *Sullivan v. Hudson*, 490 U.S. 877, 891-93 (1989)

4. *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988)

5. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 600 (1987)

6. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983)

7. *Becker v. United States*, 451 U.S. 1306, 1309 (1981)

8. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 30 n.6 (1979) (White J., dissenting) (criticizing the majority for implicitly applying the canon, but recognizing the canon except where it would constrict a statute's remedial purpose)

9. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978)

10. *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)

11. *Evans v. Newton*, 382 U.S. 296, 311 (1966) (White J., concurring)

12. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-76 (1958)

13. *Wilko v. Swan*, 346 U.S. 427, 434 n.18 (1953)

14. *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943)

15. *Neuberger v. Commissioner of Internal Revenue*, 311 U.S. 83, 88 (1940)

16. *Ford v. United States*, 273 U.S. 593, 611 (1927)

17. *United States v. Barnes*, 222 U.S. 513, 518-19 (1912)

18. *Bend v. Hoyt*, 38 U.S. 263, 271 (1839)

19. *United States v. Arredondo*, 31 U.S. 691, 724-25 (1832) (applying the canon).

APPENDIX E

Lower Federal Court Decisions Prior to *Patterson v. McLean Credit Union* Interpreting 42 U.S.C. § 1981 to Cover All Conduct Covered by § 1981 as Amended By § 101 of the Civil Rights Act of 1991

FIRST CIRCUIT

Oliver v. Digital Equipment Corp., 846 F.2d 103 (1st Cir. 1988) (discharge; harassment; terms and conditions).

Rowlett v. Anheiser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987) (discharge; retaliation).

Springer v. Seaman, 821 F.2d 871 (1st Cir. 1987) (discharge).

Burns v. Sullivan, 619 F.2d 99 (1st Cir. 1980) *cert. denied* 449 U.S. 893 (1980) (promotion denial).

DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980) (discharge; harassment)

Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972) (hiring; recruitment)

Townsend v. Exxon Company, U.S.A., 420 F. Supp. 189 (D.Mass. 1976) (refusal to rehire; discharge)

SECOND CIRCUIT

Tach v. Chemical Bank, 849 F.2d 775 (2nd Cir. 1988) (retaliatory discharge).

Lopez v. S.B. Thomas, Inc., 831 F.2d 1184 (2d Cir. 1987) (constructive discharge; harassment).

De Cintio v. Westchester County Medical Center, 821 F.2d 111 (2d Cir. 1987) (retaliation; discharge).

Hill v. Coca-Cola Bottling Co. of N.Y., 786 F.2d 550 (2d Cir. 1986) (discharge).

Martin v. Citibank, N.A., 762 F.2d 212 (2nd Cir. 1985) (discharge).

Grant v. Bethlehem Steel Corp., 622 F.2d 43 (2d Cir. 1980) (retaliation).

Hudson v. International Business Machines, Inc., 620 F.2d 351 (2d Cir. 1980) *cert. denied*, 449 U.S. 1066 (1980) (retaliation).

Powell v. Syracuse University, 580 F.2d 1150, *cert. denied* 439 U.S. 984 (1978) (2d Cir. 1978) (discharge).

Brown v. Ralston Purina, 557 F.2d 570 (2d Cir. 1975) (discharge).

Carrion v. Yeshiva University, 535 F.2d 722 (2d Cir. 1976) (discharge; promotion denial).

DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2d Cir. 1975). (discharge; retaliation).

Williams v. State University of N.Y., 635 F. Supp. 1243 (E.D.N.Y. 1986) (discharge).

Almendral v. New York State Office of Mental Health, 568 F. Supp. 571 (S.D.N.Y. 1983) *aff'd in relevant part*, 743 F.2d 953 (2d Cir. 1984) (promotion denial; discharge; retaliation)

Ingram v. Madison Square Garden Center, Inc., 482 F. Supp. 414 (S.D.N.Y. 1979) (hiring; terms and conditions; promotion denial).

Patterson v. United Federation of Teachers, 480 F. Supp. 550 (S.D.N.Y. 1979) (failure to represent).

Williams v. Interstate Motor Freight System, 458 F. Supp. 20 (S.D.N.Y. 1978) (discharge).

Lee v. Bolger, 454 F. Supp. 226 (S.D.N.Y. 1978) (promotion denial).

THIRD CIRCUIT

Kelly v. Tyk Refractories Co., 860 F.2d 1188 (3rd Cir. 1988) (discharge; constructive discharge).

Roebuck v. Drexel University, 852 F.2d 715 (3rd Cir. 1988) (failure to grant tenure).

Lewis v. University of Pittsburgh, 725 F.2d 910 (3rd Cir. 1983) *cert. denied* 469 U.S. 892 (1984) (promotion denial).

Wilmore v. City of Wilmington, 699 F.2d 667 (3rd Cir. 1983) (promotion denial).

Walton v. Eaton Corp., 563 F.2d 66 (3rd Cir. 1977) (discharge; harassment)

Wilson v. Sharon Steel Corp., 549 F.2d 276 (3rd Cir. 1977) (discharge; terms and conditions).

Commonwealth of Pa. v. Flaherty, 404 F. Supp. 1022 (W.D. Pa. 1975) (hiring).

FOURTH CIRCUIT

Sharma v. Lockheed Engineering & Mgmt. Services, Co., Inc. 862 F.2d 314 (4th Cir. 1988) (discharge).

Hughes v. International Business Machines Corp., 848 F.2d 185 (1988) (promotion denial; terms and conditions)

Lilly v. Harris-Teeter Supermarket, 842 F.2d 1496 (4th Cir. 1988) (promotion denial; terms and conditions).

Crawford v. College Life Insurance of America, 831 F.2d 1057 (4th Cir. 1987) (discharge)

McCausland v. Mason County Board of Education, 649 F.2d 278 (4th Cir. 1981) *cert. denied* 454 U.S. 1090 (discharge).

Sledge v. J.P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978) *cert. denied* 440 U.S. 981 (1979) (hiring; promotion denial; recall; terms and conditions).

Reynolds v. Abbeville County School District No. 60, 554 F.2d 638 (4th Cir. 1977) (discharge).

Roman v. E.S.B., Inc., 550 F.2d 1343 (4th Cir. 1976) (discharge; hiring)

Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976) *cert. denied* 429 U.S. 920 (1976) (promotion denial; hiring).

Day v. Patapapsco & Back Railroad Co., 504 F. Supp. 1301 (D.Md. 1981) (terms and conditions; seniority system)

FIFTH CIRCUIT

Johnson v. Chapel Hill Independent School District, 853 F.2d 375 (5th Cir. 1988) (failure to rehire; retaliation).

Hernandez v. Hill County Telephone Corp., 849 F.2d 139 (5th Cir. 1988) (hiring; promotion denial; retaliation).

Comeaux v. Unirogal Chemical Corp., 849 F.2d 191 (5th Cir. 1988) (discharge).

Price v. Digital Equipment Corp., 846 F.2d 1026 (5th Cir. 1988).

Page v. US Industries, Inc., 726 F.2d 1038 (5th Cir. 1984) (hiring; promotion denial).

Freeman v. Motor Convoy, 700 F.2d 1339 (5th Cir., 1983) (hiring; seniority).

Adams v. McDougal, 695 F.2d 104 (5th Cir. 1983) (terms and conditions; failure to rehire).

Williams v. New Orleans Steamship Association, 688 F.2d 412 *cert. denied* 460 U.S. 1038 (1982) (5th Cir. 1982) (terms and conditions).

Pinkard v. Pullman-Standard, 678 F.2d 1211 (5th Cir. 1982) *cert. denied* 459 U.S. 1105 (1983) (discharge; retaliation).

Payne v. Travenol Lab, 673 F.2d 798 (5th Cir. 1982) (hiring; promotion denial).

Rivera v. City of Wichita Falls, 665 F.2d 531 (5th Cir. 1982) (hiring; promotion denial).

Bobo v. ITT, Continental Baking Company, 662 F.2d 340 (5th Cir. 1982) *cert. denied* 456 U.S. 933 (1982) (discharge).

McWilliams v. Escambia County School Board, 658 F.2d. 326 (5th Cir. 1981) (transfer; demotion; promotion denial).

Jackson v. City of Kileen, 654 F.2d 1181 (5th Cir. 1981) (discharge).

Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980) (discharge).

Crawford v. Western Electric, 614 F.2d 1300 (5th Cir. 1980) (promotion denial).

Grigsby v. North Mississippi Medical Center, 586 F.2d 457 (5th Cir. 1978) (discharge; promotion denial; terms and conditions).

Claiborne v. Illinois Central Railroad, 583 F.2d 143 (5th Cir. 1978) *cert. denied* 442 U.S. 934 (1979) (promotion denial; discharge).

Barnes v. Jones County School District, 575 F.2d 490 (5th Cir. 1978) (discharge; demotion).

Parson v. Kaiser Aluminum & Chemical Corp., 575 F.2d 1374 (5th Cir. 1978) *cert. denied* 441 U.S. 968 (1979) (retaliation; promotion denial).

Prophet v. Armco Steel, Inc., 575 F.2d 579 (5th Cir. 1978) (discharge)

Garner v. Ciarrusso, 571 F.2d 1330 (5th Cir. 1978) (retaliation; discharge; terms and conditions).

Jenkins v. Caddo-Bossier Association for Retarded Citizens, 570 F.2d 1227 (5th Cir. 1978) (discharge; promotion denial; harassment; hiring)

Turner v. Texas Instruments, Inc., 555 F.2d 1251 (5th Cir. 1977) (discharge).

Harkless v. Sweeny, Ind., 554 F.2d 1353 (5th Cir. 1977) *cert. denied* 434 U.S. 966 (1977) (failure to rehire).

Smith v Olin, 535 F.2d 862 (5th Cir. 1976) (discharge).

Faraca v. Clements, 506 F.2d 956 (5th Cir. 1975) *cert. denied* 422 U.S. 1006 (1975) (failure to rehire).

Cooper v. Allen, 493 F.2d 765 (5th Cir. 1975) (hiring).

Belt v. Johnson Motor Lines, 458 F.2d 443 (5th Cir. 1972) (promotion denial; terms and conditions).

Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970) *cert. denied* 401 U.S. 948 (1971) (discharge).

Quarles v. Northern Miss. Retardation Center, 455 F. Supp. 52 (N.D. Miss. 1978) *aff'd*, 580 F.2d 1051 (5th Cir. 1978) (discharge).

SIXTH CIRCUIT

Erebia v. Chrysler Plastic Products Corp., 863 F.2d 47 (6th Cir. 1988) (harassment).

Singala v. Electrolux Corp., 862 F.2d 316 (6th Cir. 1988) (discharge).

Simmonds v. Superior Pontiac Cadillac, Inc., 861 F.2d 721 (6th Cir. 1988) (discharge).

Horton v. Edgcomb Metals Company, 860 F.2d 1079 (6th Cir. 1988).

Waller v. Thames, 852 F.2d 569 (6th Cir. 1988) (harassment; constructive discharge).

Hill v. Duriron Company, Inc., 656 F.2d 1208 (6th Cir. 1981) (discharge)

Grano v. Department of Development, 637 F.2d 1073 (6th Cir. 1980) (terms and conditions)

Everson v. McLouth Steel Corp., 586 F.2d 6 (6th Cir. 1978) (discharge)

Winston v. Lear-Siegler, 558 F.2d 1266 (6th Cir. 1977) (discharge; retaliation)

Long v. Ford Motor Co., 496 F.2d 500 (6th Cir. 1974) (discharge; terms and conditions; promotion)

Rodgers v. Peninsular Steel Co., 542 F. Supp. 1215 (N.D. Oh. 1982) (hiring; promotion; harassment)

Hatton v. Ford Motor Co., 508 F. Supp. 620 (E.D. Mich. 1981) (discharge)

McGee v. Grand Rapids, 486 F. Supp. 584 (W.D. Mich. 1980), *aff'd*, 663 F.2d 1072 (6th Cir. 1981) (discharge)

SEVENTH CIRCUIT

Yarborough v. Tower Oldsmobile, Inc., 789 F.2d 508 (7th Cir. 1986) (discharge).

Ramsey v. American Air Filter Co., 772 F.2d 1303 (7th Cir. 1985) (terms and conditions; harassment; layoff; discharge).

Christensen v. Equitable Life Assurance Society, 767 F.2d 340 (7th Cir. 1985) *cert. denied* 474 U.S. 1102 (1985) (constructive discharge).

Mason v. Continental Ill. National Bank, 704 F.2d 361 (7th Cir. 1983) (promotion denial).

Ekamen v. Health and Hospitals Corporation of Marion County, 589 F.2d 316 (7th Cir. 1978) *cert. denied* 469 U.S. 821 (1984) (hiring; promotion; terms and conditions; retaliation)

Flowers v. Cronch-Walker Corp., 552 F.2d 1277 (7th Cir. 1977) (discharge).

Stewart v. General Motors Corp., 542 F.2d 445 (7th Cir. 1976) *cert. denied* 433 U.S. 919 (1977) (discharge)

Gunn v. Dow Chemical Co., 522 F.Supp. 1172 (S.D. Ind. 1981) (terms and conditions; constructive discharge)

Dawson v. Pastrich, 441 F.Supp. 133 (N.D. Ind. 1977) (hiring)

EIGHTH CIRCUIT

Tart v. Levi Strauss & Co., 864 F.2d 615 (8th Cir. 1988) (discharge).

Lassiter v. Covington, 861 F.2d 680 (8th Cir. 1988) (discharge).

Estes v. Dick Smith Ford, 856 F.2d 1097 (8th Cir. 1988) (discharge)

Edwards v. Jewish Hospital of St. Louis, 855 F.2d 1345 (8th Cir. 1988) (discharge).

Scoggins v. Bd. of Education of the Nashville, Arkansas Public Schools, 853 F.2d 1472 (8th Cir. 1988) (discharge).

Monroe v. Guardsmark, Inc., 851 F.2d 1065 (8th Cir. 1988). (discharge)

Pacheco v. Advertisers Lithographing, 657 F.2d 191 (8th Cir. 1981) (promotion denial; suspension).

Owens v. Ramsey Corp., 656 F.2d 340 (8th Cir. 1981) (discharge)

Taylor v. Jones, 653 F.2d 193 (8th Cir. 1981) (discharge).

Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981) (discharge; constructive discharge).

Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir. 1981) (retaliation).

Martin v. Arkansas Arts Center, 627 F.2d 876 (8th Cir. 1980) (discharge)

Middleton v. Remington Arms Co., Inc., 594 F.2d 1210 (8th Cir. 1979) (discharge)

Hudak v. Curators of the University of Missouri, 586 F.2d 105 (8th Cir., 1978) *cert. denied* 440 U.S. 985 (1979) (discharge; harassment; terms and conditions)

DeGraffenreid v. General Motors Assembly Division, 558 F.2d 480 (8th Cir. 1977) (discharge)

Donaldson v. Pillsbury Co., 554 F.2d 825 *cert. denied*, 434 U.S. 856 (1977)(8th Cir. 1977) (discharge)

Thompson v. McDonnell Douglas Corp., 552 F.2d 220 (8th Cir. 1977) (constructive discharge).

Stevens v. Junior College of St. Louis, 548 F.2d 779 (8th Cir. 1977) (discharge; retaliation)

Jimerson v. Kisco, 542 F.2d 1008 (8th Cir. 1976) (discharge).

King v. Yellow Freight Systems, Inc., 523 F.2d 879 (8th Cir. 1975) (discharge)

Payne v. Ford Motor Co., 461 F.2d 1107 (8th Cir. 1972) (terms and conditions)

Brady v. Bristol Meyers, Inc., 459 F.2d 621 (8th Cir. 1976) (terms and conditions)

Poindexter v. Kansas City, Mo. Water Dept., 573 F. Supp. 647 (W.D. Mo. 1983) *aff'd* 754 F.2d 377 (8th Cir. 1984) (discharge)

Robertson v. Doctor's Hospital, 570 F.Supp. 663 (E.D. Ark., 1983) (discharge)

Farrakhan v. Sears, Roebuck & Co., 511 F. Supp. 893 (D. Neb. 1980) (discharge)

Rose v. Eastern Neb. Human Services Agency, 510 F. Supp. 1343 (D. Neb. 1981) (discharge)

Lindsey v. Angelica Corp., 508 F. Supp. 363 (E.D. Mo. 1981) (hiring)

Madrigal v. Certaineed, 508 F. Supp. 310 (W.D. Mo. 1981) (discharge)

Metcalf v. Omaha Steel Castings Co., 507 F. Supp. 679 (D. Neb. 1981) (discharge)

Williams v. Trans World Air Lines, Inc., 507 F. Supp. 293 (W.D. Mo. 1980), *aff'd* , 660 F.2d 1267 (8th Cir. 1981) (discharge)

Spearman v. Southwestern Bell, 505 F. Supp. 761 (E.D. Mo. 1980), *aff'd* 662 F.2d 509 (8th Cir. 1981)

Coleman v. General Motors, 504 F. Supp. 900 (E.D. Mo. 1980), (8th Cir. 1981) (discharge; retaliation)

Taylor v. Jones, 495 F.Supp. 1285 (E.D. Ark., 1980) (non-renewal; discharge)

Setser v. Novack Investment Co., 483 F. Supp. 1147 (E.D. Mo. 1980), *rev'd on other grounds*, 638 F.2d 1137, (8th Cir. 1980), *vac'd and amended*, 657 F.2d 962 (8th Cir. 1981) (retaliation; hiring)

Sutton v. Addressograph-Multigraph Corp., 481 F. Supp. 1148 (E.D. Mo. 1979) (discharge)

Buckley v. City of Omaha, 477 F. Supp. 754 (D. Neb. 1978) *aff'd*, 605 F.2d 1078 (8th Cir. 1979)(discharge)

Slotkin v. Human Development Corp., 454 F. Supp. 250 (E.D. Mo. 1978) (retaliation; constructive discharge)

Mixon v. Hanley Ind., 454 F. Supp. 386 (E.D. Mo. 1978), *aff'd*, 594 F.2d 869 (8th Cir. 1978) (failure to rehire; discharge)

Oliver v. Moberly Missouri School District, 427 F. Supp. 82 (E.D. Mo. 1977) (hiring)

Mopkins v. St. Louis Die Casting Corp., 423 F. Supp. 132 (E.D. Mo. 1976), *aff'd*, 569 F.2d 454 (8th Cir. 1978) (discharge)

Jimerson v. Kisco Co., 404 F. Supp. 338 (E.D. Mo. 1976), *aff'd*, 542 F.2d 1008 (8th Cir. 1978) (discharge)

NINTH CIRCUIT

Brown v. Boeing Company, 843 F.2d 501 (9th Cir. 1988) *cert. denied*, 488 U.S. 865 (1988)(discharge).

Mitchell v. Keith, 752 F.2d 385 (9th Cir. 1985) *cert. denied*, 472 U.S. 1028 (1985)(discharge; retaliation)

Wiltshire v. Standard Oil Co., 652 F.2d 837 (9th Cir. 1981) (discharge)

London v. Coopers & Lybrand, 644 F.2d 811 (9th Cir., 1981) (retaliation; discharge)

St. John v. Employment Development Corp., 642 F.2d 273 (9th Cir. 1981) (retaliation; discharge).

Shah v. Mt. Zion Hospital and Medical Center, 642 F.2d 268 (9th Cir. 1981) (discharge; retaliation)

Fong v. American Airlines, Inc., 626 F.2d 759 (9th Cir. 1980) (discharge)

Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (discharge).

Smallwood v. National Can Co., 583 F.2d 419 (9th Cir. 1978) (retaliation; terms and conditions)

Cooper v. Dept. of Administration, State of Nevada, 558 F. Supp. 244 (D. Nev. 1982) (hiring)

Sethy v. Alameda County Water Dist., 545 F.2d 1157 (9th Cir. 1976) (discharge; harassment)

Chatman v. U.S. Steel, 425 F. Supp. 753 (N.D. Ca., 1977) (terms and conditions)

TENTH CIRCUIT

Skinner v. Total Petroleum, Inc., 859 F.2d 1439 (10th Cir. 1988) (retaliatory discharge; discriminatory discharge).

McAlester v. United Air Lines, Inc., 851 F.2d 1249 (10th Cir. 1988) (discharge).

Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) (harassment).

Meade v. Merchants Fast Motorline, Inc., 820 F.2d 1124 (10th Cir. 1987) (discharge).

Whatley v. Scaggo Companies, Inc., 707 F.2d 1129 (10th Cir. 1983) *cert. denied*, 464 U.S. 938 (1983) discharge).

Trujillo v. State of Colorado, 649 F.2d 823 (10th Cir. 1981) (retaliation; terms and conditions; hiring)

Shah v. Halliburton Co., 627 F.2d 1055 (10th Cir. 1980) (discharge)

Manzanares v. Safeway Stores, 593 F.2d 968 (10th Cir. 1978) (terms and conditions)

Zuniga v. AMFAC Foods, Inc., 580 F.2d 380 (10th Cir. 1977) (discharge)

Taylor v. Safeway Stores, Inc., 524 F.2d 263 (10th Cir. 1975) (discharge)

Foster v. M.C.I., 555 F. Supp. 330 (D.Colo. 1983) *aff'd*, 773 F.2d 1116 (10th Cir. 1985) (discharge)

Whatley v. Skaggs, 502 F.Supp. 370 (D.Colo. 1980), *aff'd*, 707 F.2d 1129 (10th Cir. 1983) (discharge; demotion)

LaFore v. Emblem Tape & Label, 448 F.Supp. 824 (D.Colo. 1978) (discharge)

Apodaca v. General Electric Corp., 445 F. Supp. 821 (D.N.M. 1978) (discharge)

Enriquez v. Honeywell, Inc., 431 F. Supp. 901 (W.D. Ok. 1977) (terms and conditions)

ELEVENTH CIRCUIT

Baker v. Buckeye Cellulose Corp., 856 F.2d 167 (11th Cir. 1988) (retaliation).

Swint v. Pullman Standard, 854 F.2d 1549 (11th Cir. 1988) (promotion denial; terms and conditions).

Zaklama v. Mt. Sinai Medical Center of Greater Miami, 842 F.2d 291 (11th Cir. 1988) (discharge).

Graham v. Jacksonville, 568 F. Supp. 1575 (M.D.Fla. 1983) (discharge)

Nation v. Winn-Dixie Stores, Inc., 567 F. Supp. 997 (N.D.Ga. 1983) (promotion; demotion)

Schwartz v. State of Florida, 494 F. Supp. 574 (N.D.Fla. 1980) (hiring)

Johnson v. City of Albany, Georgia, 413 F. Supp. 782 (N.D.Ga. 1983) (hiring; promotion)

D.C. CIRCUIT

Frazier v. Consolidated Edison Corp., 851 F.2d 1447 (D.C. Cir. 1988) (discharge).

Barber v. American Security Bank, 841 F.2d 1159 (D.C. Cir. 1988) (discharge).

Underwood v. District of Columbia Armory Bd., 816 F.2d 769 (D.C. Cir. 1987) (promotion denial).

Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984) (terms and conditions).

Metrocare v. Washington Area Metro Area Transit Authority, 679 F.2d 922 (D.C. Cir. 1982) (discharge; failure to promote).

Harris v. Group Health Association, Inc., 662 F.2d 869 (D.C.Cir. 1981) (discharge)

Weahkee v. Perry, 587 F.2d 1256, (D.C.Cir. 1978) (discharge; promotion)

Payne v. Blue Bell, 550 F. Supp. 1324 (M.D.N.C. 1982) (discharge).

Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C.Cir. 1981) (terms and conditions; hiring)

Pope v. City of Hickory, North Carolina, 541 F. Supp. 872 (W.D.N.C. 1981), *aff'd* 679 F.2d 20 (4th Cir. 1982) (discharge; terms and conditions).

Cormier v. P.P.G. Industries, 519 F. Supp. 211 (W.D. La. 1981) *aff'd*, 702 F.2d 567 (5th Cir. 1982) (hiring; promotion denial).

Adams v. Gaudet, 515 F. Supp. 1086 (W.D.La. 1981) (hiring; promotion denial).

Fisher v. Dillard Univ., 499 F. Supp. 525 (E.D. La. 1980) (discharge; terms and conditions).

Reynolds v. Sheet Metal Workers Local 102, 498 F.Supp. 952 (D.D.C. 1980), *aff'd*, 702 F2d. 221 (D.C.Cir. 1981) (hiring; training)

Crawford v. Railway Express, Inc., 485 F. Supp. 914 (W.D. La. 1980) (retaliation).

Johnson v. Olin Corp., 484 F. Supp. 577 (S.D. Tex. 1980) (discharge)

Robertson v. Maryland State Department, 481 F. Supp. 108 (D.Md. 1978) (termination; failure to rehire)

Liotta v. National Forge Co., 473 F. Supp. 1139 (W.D. Pa. 1979), *aff'd in part, rev'd in part*, 629 F.2d 903 (3rd Cir. 1980) (discharge; retaliation).

Walker v. Robbins Hose Co., 465 F. Supp. 1023 (D.Del., 1979) (hiring).

Queen v. Dresser Industries, Inc., 456 F. Supp. 257 (D.Md. 1978) *aff'd* 609 F.2d 509 (4th Cir. 1979) (terms and conditions).

Neely v. City of Grenada, 438 F. Supp. 390 (N.D. Miss. 1977) (hiring; promotion denial).

Crocker v. Boeing Co., 437 F. Supp. 1138 (E.D. Pa. 1977), *aff'd*, 662 F.2d 975 (3rd Cir. 1981) (hiring; lay-offs; promotion denial; terms and conditions; harassment)

Winston v. Smithsonian Science Information Exchange, Inc., 437 F.Supp. 456 (D.D.C. 1977), *aff'd*, 595 F.2d 888 (D.C.Cir. 1979) (discharge; terms and conditions)

Jawa v. Fayettevill State Univ., 426 F. Supp. 218 (E.D.N.C. 1976) (discharge; terms and conditions; promotion denial; retaliation).

Johnson v. Shreveport Garment Co., 422 F. Supp. 526 (W.D.La. 1976), *aff'd*, 577 F.2d 1132 (5th Cir. 1978) (terms and conditions; promotion denial).

Morris v. Board of Education, 401 F. Supp. 188 (D.Del., 1975) (discharge; failure to rehire).

APPENDIX F

Legislative History References to
§ 101 as Restoring Pre-Patterson
Interpretation of § 1981

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
SENATE--FEBRUARY 7, 1990	
Kennedy (S1018)	"The Civil Rights Act of 1990 is intended to overturn these Supreme Court decisions and restore and strengthen these basic laws. The Patterson decision, interpreting the 1866 civil rights law . . . nullified the only Federal antidiscrimination law applicable to the 11 million workers in . . . firms with fewer than 15 employees. Already the damage is unmistakable . . . and [the decision] should be overruled by Congress."
Jeffords (S1021)	"The Civil Rights Act of 1990 was drafted with the specific intention of overruling dome of these decisions, as well as to restore and strengthen our civil rights laws. . . First. In Patterson versus McLean Credit Union, the Court reached the astounding conclusion that [§ 1981] pertained only to the formation of

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	the contracts and not to any conduct occurring thereafter. . . The Civil Rights Act of 1990 amends section 1981 to reaffirm that the right to make and enforce contracts includes the enjoyment of all the benefits, privileges, terms and conditions of the contractual relationship."
Hatfield (S1023)	"The Civil Rights Act of 1990 would essentially overturn those Supreme Court decisions. . . First, it would restore the prohibition against racial discrimination in the making and enforcement of contracts. . . [to include] the enjoyment of all benefits, terms and conditions of the contractual relationship."
Simon (S1024)	"The Civil Rights Act of 1990 would reverse five Supreme Court decisions that do particular harm to the notion of equal employment rights for all. The bill would reverse Patterson. . ." "Fortunately, Congress can, and should, step in to restore the civil rights safety net ripped open by the Supreme Court."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Packwood (S1024)	"During 1989, however, the U.S. Supreme Court issued a series of decisions in employment discrimination cases that threaten to set back our progress in the area of job opportunity by decades. As a result of the decision in Patterson . . . victims of even the most egregious racial harassment in the workplace can obtain no meaningful remedy."
Cranston (S1025)	"The bipartisan legislation being introduced today is designed to reverse the adverse impact of these decisions and to restore our Nation's strong and effective weapons against employment discrimination."
	SENATE--JUNE 8, 1990
Labor and Human Resources Committee Report (Page 12)	"Many Supreme Court decisions have held that section 1981 prohibits intentional race discrimination in the making and enforcement of private contracts, as well as in state action affecting individuals' ability to make and enforce contracts. . . The Patterson decision sharply cut back on the scope and effectiveness of section 1981."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
(Page 58)	Section 12 of the 1990 CRA "is intended to overrule the Supreme Court's decision in Patterson, which adopted an incorrect, crabbed interpretation of the law known as section 1981. . . . The Act would overrule Patterson."
	SENATE--JULY 10, 1990
Hatch (S9331)	"I have to say that with respect to the Patterson versus McLean case, which the distinguished Senator from Massachusetts said has to be overruled, there is no disagreement. I agree with that. I have from the beginning. The White House, as far as I know, has from the beginning . . . We agree that section 1981 . . . should also cover the terms and conditions. . . We are going to overturn Patterson."
	SENATE--JULY 17, 1990
Mikulski (S9845)	"That section of the substitute seeks to overrule the Supreme Court's decision in Patterson . . . and to restore the prohibition against all racial discrimination in the making

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	and carrying out of contracts in 42 U.S.C. § 1981."
Kennedy (S9848)	"Now, we put the law back to what it was prior to Patterson in our substitute. The Bush administration has also adopted virtually similar language in their own proposal, to overturn Patterson."
	SENATE--JULY 18, 1990
Kennedy (S9906)	Objecting to a substitute which would not adequately restore section 1981, stating "it is quite clear that the substitute would offer no relief to Brenda Patterson or to the victims of intentional race discrimination in the more than 200 other cases dismissed because of the Supreme Court's clear misinterpretation of the law, because we are restoring the rights of these various defendants to what they were prior to the time of the Brenda Patterson [decision], and the substitute does not do so."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Kassebaum (S9906)	"We all wish to address the five Supreme Court decisions in a way that can correct those decisions so that we can address the question of discrimination that was weakened by those five Supreme Court decisions."
Dodd (S9914)	"Last year, however, the Supreme Court shocked the American public, the Congress, and even the administration when it blatantly reneged on its commitment to providing hard-working Americans equal protection under laws. . . To restore the heart and soul to our civil rights laws . . . the Congress, in my view must act to overturn the 1989 Supreme Court rulings."
Cranston (S9942)	"The Civil Rights Act of 1990 restores the proper balance between employee and employer rights by conforming the congressional intent regarding the broad scope of our civil rights laws."
Conrad (S9957)	"This is an incredibly important proposal. It reverses or modifies a series of Supreme Court decisions which have severely weakened our country's civil rights protections."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Kohl (S9957)	"I am proud to support efforts to restore remedies and protections to employees who are victims of discrimination."
Riegle (S9957)	"One of last year's most egregious Supreme Court decisions, [Patterson], seriously limited the scope of section 1981 by protecting only against discrimination in the making of an employment contract; that is, hiring. . . . This decision seriously undermines the equal opportunity laws which have been developed over the years."
Kerry (S9958)	"Tonight we attempt to reverse the recent actions of the Supreme Court and restore the full force of the antidiscrimination law."
Levin (S9961)	"The Civil Rights Act of 1990 will restore and strengthen our civil rights laws to the scope which Congress intended and which the courts had interpreted them to have until the 1988-89 Supreme Court term."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	HOUSE--JULY 30, 1990
Committee on Education and Labor Report (Page 17)	The Patterson decision sharply cut back on the scope and effectiveness of section 1981, shattering the uniform concensus the federal courts had reached on the scope of the statute. . . . Prior to the Patterson ruling, every federal court of appeals had held that section 1981 prohibits not just discrimination at the formation of an employment contract, but discrimination during the performance of that contract as well. . . . The committee finds that The Supreme Court's ruling in Patterson v. McLean Credit Union conflicts federal appellate case law defining the scope of section 1981."
(Page 86)	"The purpose of enacting the Civil Rights Act of 1990 is to restore the rights, protections and remedies that were available under Title VII and Section 1981 prior to last year's Supreme Court's decisions. . . . [Section 1981] has provided important and in many instances exclusive federal relief against race discrimination in contractual relations, including employment relationships, for many years."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	HOUSE--JULY 31, 1990
Judiciary Committee Report (Page 42)	"Many Supreme Court decisions have held that Section 1981 prohibits intentional racial discrimination in the making and enforcement of private contracts . . . In Patterson, the Supreme Court gave Section 1981 a narrow interpretation. . . . This subsection overrules Patterson."
	HOUSE--AUGUST 2, 1990
Hayes (H6324)	"It would certainly be a sad commentary if we were to fail today to restore and strengthen our laws that attempt to wipe out prejudice on the job."
Lloyd (H6332)	"What we want to accomplish today is to restore the degree of civil rights protection provided by the 1866 and 1964 acts."
LaFalce (H6774)	"Our discrimination laws, as interpreted by the Supreme Court, are now disgracefully weak. We must reverse those Supreme Court decisions, and we must strengthen the civil rights law that exist."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Panetta (H6779)	"The Supreme Court unfortunately has eroded those tools and undermined the ability to protect equal rights. This bill restores the vital tools that we need for enforcement."
Levine (H6733)	"[T]his legislation, unamended will reverse what the Supreme Court has done in the late 1980's, in order to restore what we thought we were doing as a nation in the 1960's."
Lowey (H6790)	"The Civil Rights Act of 1990-H.R. 4000-overturns these decisions. It will restore and strengthen our civil rights laws by making clear that employment decisions based on prejudice are illegal."
Oakar (H6791)	"[T]his legislation, in seeking to overturn six recent Supreme Court decisions, merely restores civil rights laws to the conditions prior to 1989."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Mineta (H6793)	"In recent years, a number of decisions by the U.S. Supreme Court have weakened U.S. civil rights laws-the very laws that make our nation great. Today, with the Civil Rights Act of 1990, the House has the opportunity to restore the health and integrity of our commitment to civil rights."
Stokes (H6794)	"In effect, the Supreme Court has taken us back to where we were before 1964. Now Congress is having to restore those rights."
Owens (H6795)	"We have the opportunity today to help stop the backward slide, to repudiate the Supreme Court's attack on equal employment opportunity and restore the vitality of our civil rights laws."
Espy (H6796)	"[T]his is not just a civil rights bill, this is a civil [rights] restoration act."
Vento (H6799)	"H.R. 4000 clarifies Congressional intent and reinstates prior Federal judicial interpretations to include all aspects of a private contract. . ."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	HOUSE--AUGUST 3, 1990
Kennelly (H6758)	"This legislation we have before us only attempts to restore those policies that we, in the Congress, thought were operative until the Supreme Court narrowed the application of the law. . . . I think it is critical that we restore the law."
Matsui (H6763)	"The Civil Rights Act of 1990 restores to women and minorities in the workforce the guarantee that their rights will not be abridged."
Serrano (H6764)	"The purpose of the [Act] is to restore and restrengthen civil rights laws that ban discrimination in employment."
	HOUSE--OCTOBER 17, 1990
Edwards (H9977)	"The Civil Rights Act of 1990 amends the Civil Rights Acts of 1866 and 1964 to restore and strengthen civil rights laws that ban discrimination in employment. The Supreme Court dramatically narrowed these laws in a series of decisions last year."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Hayes (H9989)	"This legislation . . . restores and strengthens the protections of every American and moreover, it sends a clear message that there will be not be any reversal on our national commitment to equal justice for all."
	SENATE--OCTOBER 16, 1990
Hatch (S15329)	"There is one aspect of this bill everyone agrees with, as I understand it, or at least overwhelmingly would agree with and that is the . . . overrule of the Patterson versus McLean case."
Metzenbaum (S15334)	"This conference report embodies the will of a strong majority of the Senate. More importantly, the conference report restores basic civil rights protections for millions of Americans. Women and minorities were victimized last year in a series of stunning Supreme Court decisions. Those decisions turned back the clock on our progress toward equal opportunity."
Mikulski (S15377)	"[A]ll this legislation does is restore certain civil rights that were overturned by certain other legal

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	cases."
Adams (S15379)	"These rulings marked an erosion of the more than 25 years of progress made in eliminating discrimination in the workplace. I am proud that today we will reverse this trend and again send a message to employers throughout this country that the American people will not tolerate discrimination."
Levin (S15381)	"The Civil Rights Act of 1990 would restore and strengthen our civil rights laws in a balanced way."
Mitchell (S15400)	"[The bill] seeks to restore to the law the interpretation of job-place discrimination which was the law of the land from 1971 to 1989. It would restore explicitly to the law the understanding that a contract cannot be honored in the making and broken in the performance without contravening the law."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	SENATE--OCTOBER 24, 1990
Hatch (S16565)	Expressing opposition to one version of the bill, "except for the overrule of the Patterson versus McLean case which would take care of Brenda Patterson. We are prepared to do that right now. We are for overruling the Patterson versus McLean case."
Kassebaum (S16575)	"It is the President's view, a view I strongly share, that legislation is needed to address the Supreme Court decisions handed down last year that have weakened civil rights protections. These rulings have swung the pendulum in favor of employers and against the real and potential victims of discrimination and harassment."
Kerry (S16577)	"This bill is designed to correct those decisions, to restore the full force of the antidiscrimination laws which have guided us for more than two decades."
Hollings (S16580)	"[I]t is clear to any citizen that [Patterson] twisted the spirit of the law, and the current legislation is needed to restore its intent."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Akaka (S16585)	"Those of us who support civil rights sought this bill to overturn six recent Supreme Court decisions that have greatly diminished the ability of women and minorities to win job discrimination suits. We saw our vote as restoring prohibitions against employment discrimination that have been in force for nearly 20 years."
Levin (S16586)	"This bill would restore some of the rights we fought so hard for in the 1960's and 1970's that were lost in a few Supreme Court decisions in the 1980's. Those decisions last year took us backward. This bill would overturn those decisions and take us forward."
	SENATE--FEBRUARY 22, 1991
Simpson (S2261)	"In agreement with the administration, Senator Kennedy, and the civil rights groups, my bill would also overturn . . . Patterson."
	SENATE--MARCH 12, 1991
Hatch (S3026)	"I am pleased that that bill overturns . . . Patterson."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	SENATE--JUNE 4, 1991
Durenberger (S7026)	The Civil Rights Act overturns Patterson and "[a]ll interested parties, including the administration, civil rights groups and business groups, agree that these two cases incorrectly narrowed the protections available to minorities."
Chafee (S7027)	Patterson and the other 1989 Supreme Court decisions "established far more stringent requirements than had previously existed in discrimination suits. . . . At worst, the Court took a 180-degree turn from what we in Congress over the years have tried to do. At best they took an unnecessarily severe interpretation of our intent. . . We wrote the statutes that the Court interpreted. We must be sure the rights guaranteed by those statutes remain intact."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	HOUSE--JUNE 4, 1991
Brooks (H3834)	Patterson and other 1989 decisions "narrowed the interpretation of these laws and threaten to erode the progress we have made. Passage of H.R. 1 is, therefore, essential to assure fair treatment in the work place for all Americans."
Gephardt (H3837)	The CRA of 1991 "restores the law as it existed before the 1989 Supreme Court decisions that weakened an individual's recourse against discrimination and all but denied victims of discrimination protection under the law."
Gunderson (H3841)	"The President overturns the Supreme Court on Patterson. Yes, the Democratic bill does, too."
Moorhead (H3843)	"[T]he much criticized Patterson case is overruled."
Clay (H3844)	The 1991 Act "simply seeks to restore the fair balance between employers and employees that existed for 25 years prior to the Supreme Court's notorious 1989 term. . . Those 1989 decisions gutted title VII's effectiveness."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Wolpe (H3845)	Central purpose of the 1991 Act "is simply to restore equal employment opportunity to where it was before a series of recent Supreme Court decisions made it much more difficult for victims of discrimination."
Collins (H3859)	In Patterson "the Court turned the clock back" and the bills she supported "would reinstate these modern-day protections."
Hughes (H3859)	The Patterson provision and certain other provisions "will restore civil rights standards that served us well for many years. . . This legislation will correct the aggressive tilt in the civil rights law created by five 1989 U.S. Supreme Court decisions."
Espy (H3862)	The CRA of 1991 "does not make any radical changes in civil rights law. . . It will restore laws which have served our Nation well."
Mineta (H3862)	"Before the Supreme Court decisions, we had a system that worked for 18 years and could have worked for years to come. We need to put that system back in place."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Stokes (H3863)	The Supreme Court wrote "in the law a series of loopholes that permit many employers to discriminate with virtual impunity. . . H.R. 1 would close the court-created loopholes."
Lewis (H3865)	The CRA of 1991 "only attempts to take us back to where we were before the recent Supreme Court decisions."
Kennedy (H3866)	"For decades, the Court said that an 1866—yes, 1866—law prevented discrimination on the job. Now the Court says that the law only prevents prejudice at the door—at the time of hiring. . . Now we are going to do something about these latest backward decisions. Because America will not tolerate racial bias on the job any more than at the time of hiring."
Romer (H3866)	The CRA of 1991 "will restore and strengthen the equal employment opportunities that were severely weakened by Supreme Court decisions in 1989."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Edwards (H3869)	The 1991 Act "amends the Civil Rights Acts of 1866 and 1964 to restore and strengthen their prohibition against employment discrimination. The Supreme Court dramatically narrowed these laws in a series of decisions in 1989. . . The Michel Republican substitute reverses only one of the devastating 1989 Supreme Court decisions, the Patterson case."
Levine (H3875)	The CRA Act of 1991 "would restore to the disenfranchised American workers equal opportunity rights lost in Supreme Court decisions in 1989."
Gunderson (H3885)	"Both [H.R. 1 and the Administration's bill] overturn the Supreme Court in Patterson, restoring the expansive reading of protections against discrimination in all aspects of contracts."
Owens (H3888)	"We have the opportunity today to help stop the backward slide, to repudiate the Supreme Court's attack on equal employment opportunity and restore the vitality of our civil rights laws."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Waters (H3890)	The Supreme Court decisions "effectively eroded rights that we thought we already had."
Towns (H3895)	In Patterson, the Supreme Court "has stripped workers of any protection against racial or sexual harassment at work. . . . Only Congress can fully restore the protections and remedies stripped from American workers by the 1989 Supreme Court decisions."
Goodling (H3900)	"Probably the most important of all is the Patterson case, which is totally reversed by the President's" bill. The Michel substitute "restores the expansive reading of section 1981 that racial discrimination is prohibited in all aspects of the making and enforcement of contracts. . . . As did my colleagues on the other side of the aisle, we recognize that. . . . the Supreme Court restricted Federal civil rights protections in a manner that was not consistent with the intent of Congress."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	HOUSE--JUNE 5, 1991
Brooks (H3928)	"[D]espite the complexity of the subject matter, the simplicity of the legislative goal remains clear--that of restoring what had been the law and what had been the operating procedures for the past 25 years before the Supreme Court decided to change the rules in midcourse."
Morella (H3938)	The 1989 decisions "have narrowed the application of important civil rights laws" and the substitute "restores and strengthens our civil rights laws."
Shays (H3946)	The recent Supreme Court decisions in 1989 "seriously weakened the employment protection provisions of the landmark 1964 act. The reality is we need the Brooks-Fish civil rights bill to undo the damage done by the Supreme Court."
Zimmer (H3947)	"[T]here is nearly universal agreement that legislation is needed to reverse several restrictive Supreme Court decisions."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
McMillen (H3954)	"We are in a position today to reaffirm our commitment to equal opportunity and restore the status quo that existed before the six recent Supreme Court decisions."
Skaggs (H3956)	"America needs to regain the ground lost in civil rights as a result of recent Supreme Court decisions. . . [W]e need to put the country back on the track of progress from which the High Court derailed us in 1989."
Bustamante (H3957)	Recent Supreme Court rulings have narrowed "the scope of legislation designed to prevent work place discrimination."
Delugo (H3957)	The House has worked diligently "to frame legislation to overturn 1989 Supreme Court decisions that severely reduce remedies for civil rights violations."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	SENATE--OCTOBER 25, 1991
Kennedy (S15233)	"Members of this body have joined with administration representatives to craft a civil rights bill that will restore to all Americans the ability to enforce their rights to equal opportunity."
	SENATE--OCTOBER 28, 1991
Seymour (S15285)	"[T]he bill restores section 1981--one of the Nation's oldest civil rights laws--to its original intent by allowing victims of race discrimination in all facets of the work environment to seek legal remedies."
Metzenbaum (S15287)	In its 1989 decisions, "the Court retreated from long-standing rules and principles, making it harder for victims of discrimination to get into court, harder for them to prove their cases, and harder for them to obtain meaningful relief if they won their cases. . . [W]e are finally returning this Nation to the pursuit of fairness and equality of opportunity in the workplace."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
	SENATE--OCTOBER 29, 1991
Jeffords (S15383)	"Every civil rights proposal made over the past year and a half has included a Patterson reversal as one of its terms. . . [W]e will restore the rights taken away in Patterson."
Breaux (S15391)	The 1989 Supreme Court decisions brought "the reversal of long-standing gains in civil rights."
	SENATE--OCTOBER 30, 1991
Robb (S15445)	"This act restores the civil rights remedies which were taken away in the late 1980's by the new majority on the Supreme Court."
Dodd (S15465)	"I strongly believe that it is imperative that we restore the full force and effectiveness of our Nation's civil rights laws to millions of minorities and women."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
Gore (S15482)	"During the 1988-89 term, the U.S. Supreme Court handed down decisions in a series of cases which severely curtailed the rights of minorities and women in the workplace and made it harder for them to fight discrimination. This bill recognizes that those decisions were flawed . . . and restores protections against racial and ethnic discrimination which were struck down by these rulings."
Danforth (S15483)	The Patterson section of the bill "reinstates the prohibition of discrimination during the performance of the contract and restores protection from racial and ethnic discrimination to the millions of individuals employed by firms with fewer than 15 employees."
Danforth (S15500)	"What was wrong was that in the year 1989 the Supreme Court chose to turn the clock back, and that can never happen in civil rights; it can never be allowed to happen."

MEMBER OR OTHER SOURCE W/ PAGE CITE	REFERENCE TO § 101 OF THE CRA AS RESTORATIVE
HOUSE--NOVEMBER 7, 1991	
Edwards (H9526)	The Patterson provision "reinstates the prohibition of discrimination during the performance of the contract and restores protection for racial and ethnic discrimination to millions of individuals."

APPENDIX G

Court of Appeals Decisions Since *Bradley v. Richmond Sch. Bd.* Applying Statutes Affecting Remedies and Procedures To Pending Cases

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1. *United States v. Peppertree Apartments*, 942 F.2d 1555, 1560-61 (11th Cir. 1991) (explaining that "[s]tatutory changes that are remedial in nature apply retroactively.... The change in the statute ... does not impose a new obligation upon [the defendant]. Instead, it imposes an additional remedy on already proscribed conduct."), *petition for cert. filed* (Dec. 26, 1991).

2. *In re Resolution Trust Corp.*, 888 F.2d 57, 58 (8th Cir. 1989) (endorsing presumption favoring application to pending cases for "new enactments changing procedural or jurisdictional rules").

3. *Delta Computer Corp. v. Samsung Semiconductor*, 879 F.2d 662, 663 (9th Cir. 1989) (applying statute to pending cases when it is "addressed to remedies or procedures and does not otherwise alter substantive rights") (quoting *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir. 1985).

4. *Nichols v. Stapleton*, 877 F.2d 1401, 1403 (9th Cir. 1989) (applying to pending cases new statutes that change remedies and procedures, not substantive rights)

5. *Kruso v. International Telephone and Telegraph Corp.*, 872 F.2d 1416, 1425 (9th Cir. 1989) (endorsing presumption in favor of applying to pending claims "a statute ... addressed to remedies or procedure").

6. *DeGurules v. I.N.S.*, 833 F.2d 861, 863 (9th Cir. 1987) (finding no manifest injustice under *Bradley* when new law provides "a grant or expansion of an access to a remedy").

7. *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 748 (D.C. Cir. 1986) (explaining that "this circuit views statutes that change substantive *rights* as differing from those -- as in *Bradley* -- that merely change substantive *remedies*") (emphasis in original).

8. *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir. 1985) (endorsing presumption in favor of applying law "addressed to remedies or procedures").

9. *United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir. 1985) (endorsing presumption in favor of applying laws "that affect only procedure or remedy").

10. *United States v. Kairys*, 782 F.2d 1374, 1381 (7th Cir.), *cert. denied*, 476 U.S. 1153 (1984) (finding a statute remedial when it "relates to the means and procedures for enforcement of [existing] rights")

11. *Shirey v. Devine*, 670 F.2d 1188, 1197 (D.C. Cir. 1982) (applying new statute to pre-

existing claims where it "refined and strengthened the remedies available to enforce pre-existing rights.")

12. *Eikenberry v. Callahan*, 653 F.2d 632, 635-36 n.14 (D.C. Cir. 1981) (recognizing remedy-right distinction in determining new law's applicability to pending cases).

13. *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir. 1980) (explaining that application to pending claims of new enforcement mechanisms rarely involves any risk of serious unfairness because it "harbors much less potential for mischief than retroactive changes in the principles of liability.... Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known")

14. *Reeves v. International Tel. and Tel. Corp.*, 616 F.2d 1342, 1350 (5th Cir. 1980) (endorsing presumption in favor of applying to pre-existing claims new laws which "are procedural and affect only remedies"), *cert. denied*, 449 U.S. 1077 (1981).

15. *Samuelson v. Susen*, 576 F.2d 546., 551 (3rd Cir. 1978) (endorsing presumption in favor of applying "laws of a remedial or procedural nature").

16. *Cooper Stevedoring of Louisiana, Inc. v. Washington*, 556 F.2d 268, 272 (5th Cir.), *reh'g denied*, 560 F.2d 1023 (1977) (finding new statute applicable that affected

procedural, not substantive rights).

17. *United states v. Blue Sea Line*, 553 F.2d 445, 448 (5th Cir. 1977) (concluding that a statutory change that is "primarily procedural" takes precedence over prior law)

APPENDIX H

Court of Appeals Decisions Prior to *Bradley v. Richmond Sch. Bd.* Recognizing a Distinction Between New Laws Affecting Standards of Conduct or Vested Rights, Which Were Presumed Inapplicable to Pending Cases, and Methods for Enforcing Existing Rights, Which Were Presumed Applicable

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1. *Koger v. Ball*, 497 F.2d 702, 705 (4th Cir. 1974) (applying new remedial procedures to federal employees' race discrimination claims because "[p]rocedural statutes that affect remedies" are generally applicable to pending cases)

2. *Federal Shopping Way, Inc. v. McQuaid*, 457 F.2d 176, 180 (9th Cir. 1972) (concluding that "where the statute relates to remedies only and does not effect substantive rights, we recognize an exception to the general rule that amendments are prospective only.")

3. *United States v. Haughton*, 413 F.2d 736, 738 (9th Cir. 1969) (concluding that change in administrative procedure for conscientious objector requests applied because "[s]tatutes effecting procedural changes, which do not otherwise alter substantive rights, generally are considered immediately applicable to pending cases.")

4. *Turner v. United States* 410 F.2d 837, 842 (5th Cir. 1969) (concluding that change in administrative procedure for conscientious objector request applied because "changes

in statute law relating only to procedure or remedy are usually held immediately applicable to pending cases, including those on appeal from a lower court.")

5. *Grummit v. Sturgeon Bay Winter Sports Club*, 354 F.2d 564, 568 (7th Cir. 1966) (applying a change in the notice of injury requirement that allowed increased compensation for a negligence claim because "its retroactive effect violated no right of the defendant.")

6. *United States v. Village Corp.*, 298 F.2d 816, 820 (4th Cir. 1962) (allowing government to pursue claims against dissolved corporations under a new statute because the statute "altered no substantive right. It only altered the procedure by which substantive rights may be judicially enforced.").

7. *Dargel v. Henderson*, 200 F.2d 564, 566 n. 5 (Em. Ct.App. 1952) (applying new law conferring jurisdiction for enforcing rent regulations because "changes in procedural or remedial law are generally to be regarded as immediately applicable to existing causes of action and not merely to those which may accrue in the future unless a contrary intent is expressed in the statute.")

8. *Beatty v. United States*, 191 F.2d 317, 320 (8th Cir. 1951) (applying new law that allowed government to recover for overcharges to a tenant because presumption of prospective effect "does not apply to statutes which effect merely changes in remedies or modes of procedure

for enforcing existing liabilities.")

9. *Orr v. United States*, 174 F.2d 577, 580 (2d Cir. 1949) (removing bar to a libel claim by applying new law to a pending case because statute of limitations is only a procedural change)

10. *Bowles v. Strickland*, 151 F.2d 419 (5th Cir. 1945) (applying in a pending case a change in the statute of limitations that allowed the government to recover for three times the amount of a seller's overcharge because it "did not affect substantive rights, but related only to the procedural machinery provided to enforce such rights.")

11. *Luckenbach S.S. Co. v. Norton*, 106 F.2d 137, 138 (3d Cir. 1939) (finding that application to a pending case of new law that allowed for increased compensation for injury was "remedial, affecting matters of procedure")

12. *New Amsterdam Casualty Co. v. Cardillo*, 108 F.2d 492, 493 (D.C. Cir. 1939) (applying to a pending case a new law that allowed for increased compensation for injury because it "neither creates new, nor destroys old rights. It applies only to the remedy")

13. *Federal Reserve Bank of Richmond v. Kalin*, 77 F.2d 50 (4th Cir. 1935) (finding that new law conferring jurisdiction applied in a pending case because "'[s]tatutes relating to practices and procedure generally apply to pending actions and those subsequently instituted, although the cause of action may

have arisen before.'" (quoting *Link v. Receivers of Seabord Air Line Ry Co.*, 73 F.2d 149, 151 (4th Cir. 1934)).

14. *Downs v. Blount*, 170 F. 15, 21 (5th Cir. 1909) (holding that new law changing rules of evidence applied to a pending case because "[t]he prohibition against the enactment of retroactive law in the Texas Constitution . . . does not cut off remedial laws nor curative statutes which do not deprive one of vested rights.")

15. *Larkin v. Saffarans*, 15 F. at 149, 150 (Explaining that "one can have no vested right to any particular remedy, or to sue or be sued in any particular court," and thus applying new law conferring jurisdiction because it "takes away from these defendants no right of action, or defense to this action on its merits.")

APPENDIX I

United States Supreme Court Orders
Applying New Rules to Pending Cases Absent Injustice

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1. Order Amending Federal Rules of Criminal Procedure, 109 L. Ed. 2d xxxv (May 1, 1990) (making changes applicable to pending cases "insofar as just and practicable") (Scalia J., joining).

2. Order Amending Federal Rules of Appellate Procedure, 104 L. Ed. 2d lii (April 25, 1989) (making changes applicable to pending cases "insofar as just and practicable") (Scalia J., joining).

3. Order Amending Federal Rules of Criminal Procedure, 104 L. Ed. 2d lvi (April 25, 1989) (making changes applicable to pending cases "insofar as just and practicable") (Scalia J., joining).

4. Order Changing Federal Rules of Criminal Procedure, 94 L. Ed. 2d lxxviii (March 9, 1987) (making changes applicable to pending cases "insofar as just and practicable") (Scalia J., joining).

5. Order Changing Rules of Appellate Procedure, 89 L. Ed. 2d xliii (March 10, 1986) (making changes applicable to pending cases "insofar as just and practicable").

6. Order Amending Bankruptcy Rules, 85 L. Ed. 2d xxxix (April 29, 1985) (making changes applicable to pending cases "insofar as just and practicable").

7. Order Amending Federal Rules of Criminal Procedure, 85 L. Ed. 2d xliv (April 29, 1985) (making changes applicable to pending cases "insofar as just and practicable").

8. Order Amending Bankruptcy Rules, 75 L. Ed. 2d xliii (April 25, 1983) (making changes applicable to pending cases unless doing so would "not be feasible or would work injustice").

9. Order Amending Rules Governing Proceedings Under 28 U.S.C.S. §§ 2254, 2255 in the United States District Court, 72 L. Ed. 2d xlv (April 28, 1982) (making changes applicable to pending cases "insofar as just and practicable").

10. Order Amending Federal Rules of Criminal Procedure, 72 L. Ed. 2d lix (April 28, 1982) (making changes applicable to pending cases "insofar as just and practicable").

11. Order Modifying Rules and Forms Governing Proceedings Under 28 U.S.C.S. §§ 2254, 2255, 47 L. Ed. 2d xliv (April 26, 1976) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

12. Order Modifying Bankruptcy Rules and Forms, 47 L. Ed. 2d lxv (April 26, 1976) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

13. Order Amending Bankruptcy Rules and Forms, 44 L. Ed. 2d xxxiii (April 28, 1975) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

14. Order Changing Rules of Bankruptcy Procedure, 44 L. Ed. 2d lxi (April 28, 1975) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

15. Order Changing Bankruptcy Rules and Forms, 39 L. Ed. 2d xxxvii (March 18, 1974) (making changes applicable to pending proceedings unless doing so "would not be feasible or would work injustice").

16. Order Changing Bankruptcy Rules and Official Bankruptcy Forms, 36 L. Ed. 2d xxxvii (April 24, 1973) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

17. Order Changing Bankruptcy Rules and Official Bankruptcy Forms, 37 L. Ed. 2d xxxi (April 24, 1973) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

18. Order Establishing the Federal Rules of Evidence, 34 L. Ed. 2d lxv (November 20, 1972) (making rules applicable to pending proceedings unless doing so "would not be feasible or would work injustice").

19. Order Amending Rules of Civil Procedure for the United States District Courts 15 L. Ed. 2d lxxv (February 28, 1966) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

20. Order Amending Federal Rules of Civil Procedure, 9 L. Ed. 2d liv, lxv, lxvii (March 18, 1963) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

21. Order Amending Federal Rules of Civil Procedure and Forms, 6 L. Ed. 2d xxxvii, xxxviii - ix (April 17, 1961) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

22. Order Amending Rules of Practice in Admiralty and Maritime Cases, 6 L. Ed. 2d xl, xlvii - viii (April 17, 1961) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

23. Order Amending Federal Rules of Civil Procedure, 91 L. Ed. 2113, 2124 (Dec. 27, 1946) (making changes applicable to pending cases unless doing so "would not be feasible or would work injustice").

24. Order Adopting Rules of Civil Procedure for the District Courts of the United States, 82 L. Ed. 1563, 1608 (Dec. 20, 1937) (making rules applicable to pending proceedings unless doing so "would not be feasible or would work injustice").

APPENDIX J

Old Treatises Recognizing The Rule in Favor of Application of New Remedial, Procedural, and Restorative Statutes to Pending Cases

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1. H.C. Black, Handbook on the Construction and Interpretation of the Laws (1911)

Defining "the General Rule" to incorporate certain established exceptions:

> Except in the case of *remedial* statutes and those which relate to procedure in the courts, it is a general rule that acts of the legislature will not be so construed to make them operate retrospectively....

Id. at 385 (emphasis added).

Defining "retrospective" as altering substantive or vested rights:

> A retrospective law is one which is made to affect acts or transactions occurring before it came into effect, or rights already accrued, and which imparts to them effects which are not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence.

Id. at 380.

> The statutes ... subjected to the strictness of judicial construction -- statutes which may be properly be denominated 'retrospective' -- are

> such as take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability, in respect to transactions or considerations already past.

Id. at 404.

Explaining that remedial statutes may be applied retrospectively:

> Remedial statutes are to be liberally construed; and if a retrospective interpretation will promote the ends of justice and further the design of the legislature in enacting them, or make them applicable to cases which are within the reason and spirit of the enactment, though not within its direct words, they should receive such a construction, provided it is not inconsistent with the language employed.... In the class of statutes which may be construed retrospectively are those which create a new remedy, or enlarge the existing remedy for existing causes of action.

Id. at 404-410.

Explaining that it is also the norm to apply new procedures to pre-existing claims:

> Statutes regulating the procedure of the courts will be construed as applicable to causes of action accrued, and actions pending and undetermined, at the time of their passage, unless such actions are expressly excepted, or unless vested rights would be disturbed by giving them a retrospective

> operation.

Id. at 108.

2. C. Endlich, Commentary on the Interpretation of Statutes (1888)

Defining narrowly the presumption against retroactivity:

> Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation.... It is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions, that the rule in question prevails.

Id. at 362-67

Stating that the opposite rule of construction prevailed for new legislation regarding the means of enforcing existing rights:

> [T]he presumption against a retroactive construction has no application to enactments which affect only the procedure and practice of the Courts ..., even where the alteration which the statutes make has been disadvantageous to one of the parties.... The remedy does not alter the contract or the tort; it takes away no vested right for the defaulter can have no vested right in a state of the law which left the injured party without, or with only a defective remedy.... The general principle, indeed, seems to be that alterations in the procedure are always retrospective, unless there be some good reason against it.

Id. at 386-7.

Citing as examples of statutes presumptively applicable to pending claims:

> laws changing the forum in which a claim is to be determined, *id.* at 387;
>
> provision of new remedies for existing rights, *id.* at 388;
>
> provision for or limiting of costs, *id.* 388;
>
> provision for or limiting of counsel fees, *id.* at 388, 390;
>
> extending the period of limitations, *id.* at 390.

3. W.G. Myer, Vested Rights (1891)

Emphasizing that retroactivity "in a legal sense" did not encompass many applications of new legislation to pre-existing claims:

> The general rule is, that a statute will not be construed as retroactive in its operation, unless the intention that it shall so act appears on its face.... It is to be understood, of course, that the rule applies to such laws only as are retrospective in a legal sense, and not such as are simply curative or remedial.... Statutes which are remedial in their effect will be given a retrospective operation, unless the contrary intent appears.... The rule as to remedial statutes is stated thus: Statutes are, in the absence of directions to the contrary, retrospective in their operation whenever they

> are remedial, as where they create new remedies for existing rights....

Id. at 18.

4. H. Broom, Legal Maxims (8th ed. 1911)

> No suitor ... has a vested interest in the course of procedure, or a right to complain, if during his litigation the procedure is changed, provided that no injustice be done. Alterations in the form of procedure are always retrospective, unless there be some good reason to the contrary; and so are alterations in the law of evidence in matters both civil and criminal.

Id. at 27.

5. 59 Corpus Juris §§ 696, 700, at. 1171-74 (1932)

> Retroactive legislation changing rights is not favored, and the rule that statutes are not to be construed retrospectively unless such construction was plainly intended by the legislature applies with peculiar force.... A difference is recognized between statutes affecting substantial rights and those affecting only procedure.... The general rule that statutes will be construed to be prospective only ... ordinarily does not apply to statutes affecting remedy or procedure.... [I]n the absence of directions to the contrary statutes merely affecting the remedy or law of procedure apply to actions thereafter, whether the right of action accrued before or after the

change in the law.

Id. See also 82 *C.J.S.* Statutes §§ 421-25, at. 976-1001.

6. 50 American Jurisprudence "Statutes" § 482, at 505-06 (1944)

Emphasizing that the word "retrospective" had a special "legal sense" related to vested rights and new duties:

> A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. Hence, remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. To the contrary, statutes or amendments pertaining to procedure are generally held to operate retrospectively, where the statute or amendment does not contain language clearly showing a contrary intention. Indeed, in the absence of any savings clause, a new law changing a rule of practice is generally regarded as applicable to all cases then pending. A fortiori, a statute or amendment which furnishes a new remedy, but does not impair or affect any contracted obligations or disturb vested rights, is applicable to proceedings begun after its passage, though

> relating to acts done previously thereto.

73 *Am. Jur.* 2d "Statutes" § 354-55, at 489-91.

APPENDIX K

Colorado, Montana, New Hampshire, and Ohio Cases Interpreting the Respective State Constitutional Provision Prohibiting "Retroactive" Statutes

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Colorado

Article 2, § 11 of the Colorado Constitution provides that, "[n]o ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly."

Continental Title Co. v. District Ct., Etc., 645 P.2d 1310, 1315 (1982) ("Application of a statute to a subsisting claim for relief does not violate the prohibition of retroactive legislation where the statute effects a change that is only procedural and remedial in nature.")

People v. Board of Trustees of Firemen's Pension Fund, 82 P.2d 765, 771 (1938) (retrospective act is defined as "one which takes away or impairs vested rights acquired under existing laws. . . .")

Moore v. Chalmers-Galloway Live Stock Co., 10 P.2d 950, 952 (1932) ("the abolition of an old remedy or the substitution of a new one" is not considered as "impairing a vested right or imposing a new duty," and therefore does not constitute a retrospective act)

Evans v. City of Denver, 57 P. 696, 697 (1899) (a retrospective statute is defined as one which "abrogates an existing right of action or defense. . . .")

Perry v. City of Denver, 59 P. 747, 748 (1899) (a retrospective law is defined as one "which takes away or impairs vested

rights acquired under existing laws. . . .")

French v. Deane, 36 P. 609, 613 (1894) (defining "[a] statute which takes away or impairs any vested right. . . . " as "retrospective or retroactive.")

Montana

Article XIII, § 1(3) of the Montana Constitution provides that, "[t]he legislature shall pass no law retrospective in its operations which imposes on the people a new liability in respect to transactions or considerations already passed."

Neel v. First Federal Sav. and Loan Assoc., 675 P. 2d 96, 101 (Mont. 1984) ("A retroactive law is one which '[T]akes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions already past.'")

Castles v. State Ex Rel. Mont. Dept. of Highways, Mont., 609 F.2d 1223, 1225 (1980) ("Statutes that modify the procedure for exercising a vested right or carrying out a duty do not constitute retroactive legislation.")

Continental Oil Co. v. Montana Concrete Co., 207 P. 116, 118 (1922) (a retroactive law as proscribed by the constitution is one which "takes away or impairs vested rights acquired under existing laws. . . .")

New Hampshire

Part I, Article 23d of the New Hampshire Constitution states that, "[r]etrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil cases, or the punishment of offenses."

Gould v. Concord Hospital, 126 N.H. 405, 408 (1985) (a retrospective law as prohibited by the constitution, is one which "impairs a vested legal right.")

Socha v. City of Manchester, 126 N.H. 289, 291 (1985) ("To be retrospective [as prohibited by the constitution] a statute must impair a vested legal right.")

Gelinas v. Mackey, 123 N.H. 690, 695 (1983) ("A statute may apply to cases commenced but not yet decided when it is enacted, if it is remedial or procedural in nature.")

Lozier v. Brown Co., 121 N.H. 67, 70 (1981) ("Statutes that apply to remedies do not come within this constitutional prohibition [against retroactivity] and may be applied retroactively.")

Smith v. Sampson, 114 N.H. 638, 641 (1974) ("As such [remedial] statutes do not take away, impair, or affect those [substantive] rights, they do not come within the prohibition of N.H. Const. pt.I, art. 23 against retrospective laws.")

Simpson v. Savings Bank, 56 NH 466, 471 (1876) (a law which retroacts upon a past transaction, but affects the remedy only and does not affect it "injuriously, oppressively, or unjustly," is not considered retroactive within the meaning of the constitutional prohibition)

Rich v. Flanders, 39 N.H. 304, 322 (1859) ("[A]ny statute which changes or affects the remedy, and does not destroy or impair any vested right - which does not destroy any existing right of action or of defence, or create any new ground of action or of defence, is not a retrospective law in the sense in which such laws are prohibited by the constitution. . . ."

Willard v. Harvey, 24 N.H. 344, 353 (1852) ("[A] statute which changes or modifies the remedy of a party for the

recovery of his claim, which limits or restricts the process by which it is to be enforced . . . is not within the prohibition of the Constitution as a retrospective law. . . .")

Clark v. Clark, 10 N.H. 380, 386 (1839) (defining as retrospective a law which "tak[es] away or abrogat[es] a perfect existing right, although no suit or legal proceeding then exists.")

Ohio

Article II, § 28 of the Ohio Constitution provides in part that, "[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts. . . . "

State Ex Rel. McGovern v. Board of Elections, 263 N.E. 2d 586, 588 (1970) ("Retroactive laws have been defined as those which take away a vested right, or impose a new obligation or duty or disability with respect to transactions already passed")

Lash v. Mann, 49 N.E. 2d 689, 692 (1943) ("It is a general rule that there is no vested right in an existing remedy . . . and that a Statute subsequently passed may alter, modify or curtail such remedy provided a reasonable time is given for the assertion of the remedy.")

Weil v. Taxicabs of Cincinnati, 39 N.E. 2d 148 (1942) (the Constitutional provision prohibiting the passage of retroactive laws applies to laws disturbing substantive rights as distinguished from laws merely changing the remedy for the enforcement of those rights)

Columbian Building & Loan Co. v. Meddles, 35 N.E. 2d 902, 904 (1941) ("[parties to a contract] have no vested interest . . . as to the forms of action or modes or remedy. The Legislature may change these at its discretion, provided

adequate means for enforcing the right remains.")

State v. Zangerle, 14 N.E. 2d 932, 934 (1938) ("[E]very Statute that is designed to act retrospectively is not retroactive within the terms . . . of the constitution of 1851, which forbids the general assembly of this state to pass 'retroactive' laws. Whether a statute falls within the prohibition of this provision of the constitution depends upon the character of the relief that it provides. If it creates a new right, rather than affords a new remedy to enforce an existing right, it is prohibited by this clause of the constitution of this state.")

City of Cincinnati v. Bachmann, 199 N.E. 853, 854-55 (1935) (holding that new remedies may be given for enforcing existing rights without violating Constitutional and statutory inhibitions on retroactivity)

Gray v. City of Toledo, 89 N.E.D 12, 13 (1909) (adopted Justice Story's definition of a retrospective law, which provides that, "every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

Miller v. Hixson, 59 N.E. 749, 752 (1901) (a statute which imposes a new or additional burden, duty, obligation, or liability as to past transactions is retroactive and void under the State Constitution)

Rairden and Burnett v. Holden, 15 Ohio St. 207, 210 (1864) (adopting Justice Story's definition of a retrospective law, which provides, "[u]pon principle, every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."

APPENDIX L

Other State Cases Interpreting Prohibitions on "Retroactive" Statutes

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Alabama

Harlan v. State, 18 So. 2d 744, 747 (1944) ("The general rule prevails that unless expressly prohibited or unless some contractual rights are intervened, a statute which is remedial or procedural by its terms and provisions applies whether the cause of action accrued or had its inception before or after the effective date of the act.")

California

Davis & McMillan v. Industrial Accident Comm'n, 246 P. 1046, 1048 (1926) ("'Retrospective statutes are usually considered to embrace only those which relate to substantial rights, as those which destroy or impair an existing right, or give a right which never before existed; and statutes which affect remedies only are not within the scope of the inhibition against retrospective laws, unless the remedy is entirely taken away, or is encumbered with conditions which render it impracticable.'")

Illinois

Fireside Chrysler-Plymouth v. Chrysler, 472 N.E. 2d 861, 866 (Ill.App.Ct. 1984) (establishing that a "retroactive law" is "one that impairs vested rights," the Court went on to define a "vested right" as "more than a mere expectation based upon an anticipated continuance of existing law; it must have become a fixed right, complete and consummated."

Michigan

Stott v. Stott Realty Co., 284 N.W. 635, 640 (1939) ("The

constitutional prohibition of the passage of retroactive laws, Const. art. 239, refers only to retroactive laws that injuriously affect some substantial or vested right, and 'does not refer to those remedies adopted by a legislative body for the purpose of providing a rule to secure for its citizens the enjoyment of some natural right, equitable and just in itself, but which they were not able to enforce an account of defects in the law or its omission to provide the relief necessary to secure such right.'")

Missouri

Swedge v. Kansas City, St. L & C.R. Co., 53 S.W.2d 284, 288 (1932) (legislation going to the remedy "is not a retrospective law within the meaning of that term as used in the Constitution.")

North Carolina

B-C Remedy Co. v. Unemployment Compensation Comm'n, 36 S.E. 2d 733, 737 (1946) (remedial statutes may be applied retroactively "in the absence of directions to the contrary when they create new remedies for existing rights, remove penalties or forfeitures, extenuate or mitigate offenses . . . unless in doing this we violate some contract obligation or divest some vested right.")

Oklahoma

In re Ross, 207 P.2d 254, 256 (1949) ("[A] retrospective or retroactive law is one which takes away or impairs vested or accrued rights under existing laws.")

Tennessee

Baker v. Rose, 56 S.W.2d 732, 734 (1933) ("A retrospective law within [the] constitutional inhibition, is one which infringes or divests vested rights.")

Texas

McCain v. Yost, 284 S.W.2d 898, 900 (1955) ("A statute cannot be said to be a retroactive law prohibited by the constitution unless it can be shown that the application of the law would take away or impair vested rights acquired under existing law.")

De Cordova v. City of Galveston, 4 Tex 470, 479-80 (1849) ("Laws are deemed retrospective and within the constitutional prohibition which by retrospective operation destroy of impair vested rights . . . but laws which affect the remedy merely are not within the scope of the inhibition unless the remedy be taken away altogether or incumbered with conditions that would render it useless or impracticable to pursue it.")

APPENDIX M

Prior View of Roadway Counsel
Glen D. Nager Expressed in Legislative History of Civil Rights Act of 1991

Counsel for Roadway, Glen D. Nager, together with Laurie W. Finneran, both of Jones Day, Reavis & Pogue, wrote:

> The Supreme Court has espoused the principle that "a court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). Courts generally will not find "manifest injustice" where "there [is] no change in the substantive obligation of the parties." *Id.* at 721; *see also Hallowell v. Commons*, 239 U.S. 506, 508 (1916). Therefore, as a matter of statutory construction, courts distinguish between statutes that affect only procedures and remedies, which presumptively apply to the pending litigation, and statutes that affect substantive rights, which did not enjoy a presumption of retroactivity.

> "The purpose behind this rule of construction is clear. [Although] [n]on-retrospective application of statute prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed, [t]his danger is not present where statutes merely affect *remedies or procedures*." *Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir. 1985).

137 Cong. Rec. S 15959 (daily ed. Nov. 5, 1991) (Emphasis added).

APPENDIX N

Court of Appeals Decisions Applying New Statutes Providing Additional Remedies for Conduct Already Illegal Under Other Law

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Decisions Applying in Pending Cases the Provision in the 1972 Civil Rights Act Authorizing Damages Against the Government

1. *Koger v. Ball*, 497 F.2d 702, 705 - 07 (4th Cir. 1974) (explaining that "the 1972 Act did not create a new substantive right for federal employees" but rather provided them with a new remedy for their already existing right to be free from racial discrimination in employment which dated back at least to a 1969 Executive Order.)

2. *Womack v. Lynn*, 504 F.2d 267, 269 & n.5 (D.C. Cir. 1974) (applying new provision because it "is merely a procedural statute that affects the *remedies* available to federal employees suffering from employment discrimination." Relying on executive orders dating back to 1948, the court concluded that "[t]heir *right* to be free of such discrimination has been assured for years.") (Emphasis in original).

3. *Thompson v. Sawyer*, 678 F.2d 257, 287 - 88 (D.C. Cir. 1982) (explaining that the 1972 Amendments to Title VII were for federal workers "a new means to enforce their preexisting right to be free from discrimination" that dated back at least to a 1969 Executive Order.)

4. *Sperling v. United States*, 515 F.2d 465, 471 n.14, 473 - 74 (3d Cir.), *cert. denied*, 426 U.S. 919 (1975) (applying new provision as a new remedy for a right dating back to executive orders since 1948, and describing it as "a classic example of a procedural or remedial statute applicable to cases pending at the time of enactment").

5. *Adams v. Brinegar*, 521 F.2d 129, 131 - 32 (7th Cir. 1975) (explaining that based on the Fifth Amendment and executive orders dating back to 1948 the "right of federal employees to seek relief from racial discrimination by the federal government was thus available some years before . . . 1972. Section 717(c) simply provided one more step in the existing review process.")

7. *Mahroom v. Hook*, 563 F.2d 1369, 1373 (9th Cir. 1977) (relying on reasoning in *Koger* and *Womack* in applying 1972 Amendments to pending cases), *cert. denied*, 436 U.S. 904 (1978)

8. *Eastland v. Tennessee Valley Authority*, 553 F.2d 364, 367 n.5 (5th Cir. 1977) (applying 1972 amendments to pending cases)

9. *Huntley v. Department of Health, Education and Welfare*, 550 F.2d 290, 295 (5th Cir.), *cert. denied*, 434 U.S. 985 (1977) (same)

10. *Allen v. United States*, 542 F.2d 176, 177 n.2 (3rd Cir. 1976) (same)

11. *Weahkee v. Powell*, 532 F.2d 727, 729 (10th Cir. 1976) (endorsing reasoning in *Koger* and *Womack*)

12. *Ettinger v. Johnson*, 518 F.2d 648, 651 n.71 (3rd Cir. 1975) (relying on *Sperling, Koger and Womack*)

13. *Brown v. General Services Administration*, 507 F.2d 1300, 1305-06 (2d Cir. 1974), *aff'd* 425 U.S. 820 (1976) (endorsing reasoning of *Womack* and *Koger*)

Decisions Applying in Pending Cases the 1974 Amendments to Age Discrimination in Employment Act

1. *Bunch v. United States*, 548 F.2d 336, 339 (9th Cir. 1977) (concluding that "[t]he age discrimination policy, like the anti-discrimination policy of Title VII, was seriously hampered by the lack of any effective enforcement machinery prior to the amendments in issue. The ADEA amendments, like the 1972 Title VII amendments, did not create new substantive rights, but simply created new procedures and remedies" for vindicating pre-existing rights granted in earlier executive orders) (citations omitted).

Decisions Applying in Pending Cases the 1974 and 1977 Amendments to the Fair Labor Standards Act

1. *Bush v. State Industries, Inc.*, 599 F.2d 780, 786 (6th Cir. 1979) (finding the 1977 amendment applicable because "[a]n employee's right to be free from discharge or other employment discrimination for attempting to have enforced the provisions of the FLSA has been protected for years. The amendment. . . did not create new substantive rights, but simply affected the remedies available to employees for vindication their pre-existing rights.")

APPENDIX O

Decisions Citing to Legislative History in Which Members of Congress Expressed Their Reliance on *Bradley v. Richmond Sch. Bd.*

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1. *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1554 (11th Cir. 1984) (Sen. Kennedy, Rep. Sensenbrenner)

2. *People of State of Illinois v. I.C.C.*, 698 F.2d 868, 872 (7th Cir. 1983) (Conference Report)

3. *Gautreaux v. Chicago Housing Authority*, 690 F.2d 601, 603-04 (7th Cir. 1982) (House Report)

4. *Alphin v. Henson*, 552 F.2d 1033, 1035 n.3 (4th Cir. 1977) (Sens. Hart and Abourezk)

5. *Finney v. Hutto*, 548 F.2d 740, 742 n.5 (8th Cir. 1977) (Rep. Drinan), *aff'd*, 437 U.S. 678 (1978)

6. *Rainey v. Jackson State College*, 551 F.2d 672, 676 n. 5 (5th Cir. 1977) (Sen. Abourezk, House Report)

7. *Stanford Daily v. Zurcher*, 550 F.2d 464, 466 (9th Cir. 1977) (House Report)

8. *Wharton v. Knefel*, 562 F.2d 550, 557 n.33 (8th Cir. 1977) (Sen. Kennedy, House Report)